CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 **APRIL 21, 1993** **NO. 16**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 93–22)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: APRIL 1 THROUGH JUNE 30, 1993

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.697000
Austria	Schilling	0.088590
Belgium	Franc	0.030395
Brazil	Cruzado	N/A
Canada	Dollar	0.794597
China, P.R.	Renminbi yuan	0.174420
Denmark	Krone	0.162999
Finland	Markka	0.172429
France	Franc	0.184434
Germany	Deutsche mark	0.626174
Hong Kong	Dollar	0.129324
India	Rupee	0.031746
Iran	Rial	N/A
Ireland	Pound	1.524000
Italy	Lira	0.000630
Japan	Yen	0.008764
Malaysia	Dollar	0.385654
Mexico	Peso	N/A
Netherlands	Guilder	0.556979
New Zealand	Dollar	0.527600
Norway	Krone	0.147275
Philippines	Peso	N/A
Portugal	Escudo	0.006759
Singapore	Dollar	0.611808
South Africa, Republic of	Rand	0.314861
Spain	Peseta	0.008761
Sri Lanka	Rupee	0.021088
Sweden	Krona	0.131475
Switzerland	Franc	0.674582

FOREIGN CURRENCIES–Quarterly rates of exchange: April 1 through June 30, 1993 (continued):

Country	Name of currency	U.S. dollars
Thailand	Baht (tical)	$0.039463
United Kingdom	Pound	1.526000
Venezuela	Bolivar	N/A

Dated: April 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–23)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR MARCH 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

March 1, 1993	$0.004484
March 2, 1993	.004501
March 3, 1993	.004496
March 4, 1993	.004521
March 5, 1993	.004429
March 8, 1993	.004450
March 9, 1993	.004435
March 10, 1993	.004444
March 11, 1993	.004440
March 12, 1993	.004435
March 15, 1993	.004446
March 16, 1993	.004437
March 17, 1993	.004423
March 18, 1993	.004452
March 19, 1993	.004502
March 22, 1993	.004484
March 23, 1993	.004496
March 24, 1993	.004502
March 25, 1993	.004464
March 26, 1993	.004500
March 29, 1993	.004496
March 30, 1993	.004496
March 31, 1993	.004546

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 1993 (continued):

South Korea won:

March 1, 1993	$0.001253
March 2, 1993	.001253
March 3, 1993	.001254
March 4, 1993	.001254
March 5, 1993	.001255
March 8, 1993	.001256
March 9, 1993	.001256
March 10, 1993	.001256
March 11, 1993	.001258
March 12, 1993	.001255
March 15, 1993	.001255
March 16, 1993	.001257
March 17, 1993	.001257
March 18, 1993	.001256
March 19, 1993	.001257
March 22, 1993	.001256
March 23, 1993	.001256
March 24, 1993	.001256
March 25, 1993	.001256
March 26, 1993	.001256
March 29, 1993	.001256
March 30, 1993	.001255
March 31, 1993	.001255

Taiwan N.T. dollar:

March 1, 1993	$0.038684
March 2, 1993	.038625
March 3, 1993	.038623
March 4, 1993	.038700
March 5, 1993	.038674
March 8, 1993	.038610
March 9, 1993	.038552
March 10, 1993	.038491
March 11, 1993	N/A
March 12, 1993	.038489
March 15, 1993	.038351
March 16, 1993	.038314
March 17, 1993	.038292
March 18, 1993	.038303
March 19, 1993	.038292
March 22, 1993	.038278
March 23, 1993	.038285
March 24, 1993	.038263
March 25, 1993	.038270
March 26, 1993	.038270
March 29, 1993	N/A
March 30, 1993	.038226
March 31, 1993	.038300

Dated: April 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–24)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR MARCH 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93–1 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: None.

Finland markka:

March 1, 1993	$0.167015
March 2, 1993	.168209
March 3, 1993	.167504
March 4, 1993	.167926
March 5, 1993	.165563
March 8, 1993	.166681
March 9, 1993	.164636
March 10, 1993	.165235
March 11, 1993	.164352
March 12, 1993	.163479
March 15, 1993	.165494
March 16, 1993	.165673
March 17, 1993	.166113
March 18, 1993	.167043
March 19, 1993	.169377
March 22, 1993	.168677
March 23, 1993	.169176
March 24, 1993	.169205
March 25, 1993	.167813
March 26, 1993	.169233
March 29, 1993	.169147
March 30, 1993	.170097
March 31, 1993	.171145

India rupee:

March 1, 1993	$0.029851
March 2, 1993	.030488
March 3, 1993	.030960
March 4, 1993	.030960
March 5, 1993	.031153
March 8, 1993	.031250
March 9, 1993	.031447
March 10, 1993	.031447
March 11, 1993	.031348
March 12, 1993	.031447
March 15, 1993	.031447
March 16, 1993	.031348
March 17, 1993	.031447
March 18, 1993	.031447

FOREIGN CURRENCIES–Variances from quarterly rates for March 1993 (continued):

India rupee (continued):

March 19, 1993	$0.031496
March 22, 1993	.031496
March 23, 1993	.031496
March 24, 1993	.031496
March 25, 1993	.031496
March 26, 1993	.031496
March 29, 1993	.031746
March 30, 1993	.031746
March 31, 1993	.031746

Ireland pound:

March 1, 1993	$1.475800
March 2, 1993	1.480000
March 3, 1993	1.475000
March 4, 1993	1.482500
March 5, 1993	1.457600
March 8, 1993	1.464100
March 9, 1993	1.458000
March 10, 1993	1.461400
March 11, 1993	1.461900
March 12, 1993	1.457700
March 15, 1993	1.462500
March 16, 1993	1.460000
March 17, 1993	1.458500
March 18, 1993	1.466400
March 19, 1993	1.484500
March 22, 1993	1.481700
March 23, 1993	1.488600
March 24, 1993	1.490400
March 25, 1993	1.479500
March 26, 1993	1.489400
March 29, 1993	1.492400
March 30, 1993	1.503500
March 31, 1993	1.512200

Italy lira:

March 9, 1993	$0.000622
March 10, 1993	.000624
March 11, 1993	.000623
March 12, 1993	.000622
March 15, 1993	.000623
March 16, 1993	.000622
March 17, 1993	.000622
March 18, 1993	.000626
March 25, 1993	.000624
March 29, 1993	.000620
March 30, 1993	.000624

Japan yen:

March 1, 1993	$0.008421
March 2, 1993	.008491
March 3, 1993	.008529
March 4, 1993	.008562
March 5, 1993	.008500

FOREIGN CURRENCIES–Variances from quarterly rates for March 1993 (continued):

Japan yen (continued):

March 8, 1993	$0.008575
March 9, 1993	.008518
March 10, 1993	.008466
March 11, 1993	.008506
March 12, 1993	.008489
March 15, 1993	.008442
March 16, 1993	.008554
March 17, 1993	.008529
March 18, 1993	.008556
March 19, 1993	.008624
March 22, 1993	.008645
March 23, 1993	.008643
March 24, 1993	.008556
March 25, 1993	.008525
March 26, 1993	.008591
March 29, 1993	.008564
March 30, 1993	.008575
March 31, 1993	.008703

New Zealand dollar:

March 31, 1993	$0.129408

Sri Lanka rupee:

March 1, 1993	N/A
March 2, 1993	N/A
March 3, 1993	N/A
March 9, 1993	N/A
March 10, 1993	N/A
March 12, 1993	N/A
March 17, 1993	N/A
March 22, 1993	N/A
March 25, 1993	N/A
March 26, 1993	N/A

Sweden krona:

March 1, 1993	$0.128783
March 2, 1993	.129517
March 3, 1993	.129702
March 4, 1993	.130463
March 5, 1993	.129116
March 8, 1993	.131363
March 9, 1993	.131044
March 10, 1993	.131423
March 11, 1993	.128518
March 12, 1993	.128197
March 15, 1993	.127502
March 16, 1993	.128205
March 17, 1993	.127894
March 18, 1993	.128469
March 19, 1993	.129769
March 22, 1993	.129324

FOREIGN CURRENCIES–Variances from quarterly rates for March 1993 (continued):

Sweden krona (continued):

March 23, 1993	$0.129224
March 24, 1993	.128924
March 25, 1993	.127812
March 26, 1993	.129634
March 29, 1993	.129041
March 30, 1993	.129921

Dated: April 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

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19 CFR Part 10

(T.D. 93–25)

RECIPROCAL PRIVILEGES EXTENDED TO AIRCRAFT REGISTERED IN SINGAPORE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Singapore to the list of countries whose registered commercial aircraft are entitled to certain privileges that exempt from Customs duties and internal revenue taxes their supplies and equipment that are withdrawn from Customs or internal revenue custody. Customs has been duly informed that the Government of Singapore allows exemption privileges to U.S.-registered aircraft in connection with international commercial operations that are substantially reciprocal to the exemption privileges that may be allowed under U.S. law to aircraft of foreign registry. Accordingly, Customs is extending reciprocal exemptions.

EFFECTIVE DATE: This amendment is effective April 8, 1993. These reciprocal privileges became effective June 1, 1992.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Entry Rulings Branch (202) 482–7040.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Sections 309(a)(3) and (d) and 317, Tariff Act of 1930, as amended (19 U.S.C. 1309(a)(3) and (d) and 1317), provide that foreign-registered air-

craft engaged in foreign trade may withdraw from Customs or Internal Revenue custody, free of customs duties and internal-revenue taxes imposed by reason of importation, articles of foreign or domestic origin for supplies (including equipment), ground equipment, maintenance, or repair of the aircraft. The privileges granted by these sections are allowed only if the Secretary of Commerce finds and advises the Secretary of the Treasury that the foreign country in question affords substantially reciprocal privileges to U.S.-registered aircraft. The regulations implementing these reciprocal duty-free customs and internal-revenue tax exemptions are found at § 10.59(f), Customs Regulations (19 CFR 10.59(f)), which enumerates those countries entitled to reciprocal privileges and designates the extent of the exemptions allowed.

In accordance with 19 U.S.C. 1309(d), the Acting Deputy Assistant Secretary for Service Industries and Finance, International Trade Administration, Department of Commerce, has advised the Customs Service by letter dated February 23, 1993, that, following an appropriate investigation and based on Article 8 of the Singapore-United States Air Transport Agreement, dated March 31, 1978, the Government of Singapore allows U.S.-registered aircraft engaged in international commercial operations exemption privileges substantially reciprocal to those exemption privileges allowed to foreign-registered aircraft by §§ 309 and 317 of the Tariff Act of 1930, as amended. The effective date of these findings was June 1, 1992. This document amends the list in § 10.59(f), Customs Regulations (19 CFR 10.59(f)), by adding Singapore to the list of countries entitled to reciprocal privileges.

Authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12291

Because the subject matter of this document does not constitute a departure from established policy or procedures, but merely announces the granting of an exemption for which there is a statutory basis, it has been determined, pursuant to 5 U.S.C. 553(b)(B), that the notice and public comment procedures thereon are unnecessary. Further, for the same reasons and because Singapore has been found to be presently granting reciprocal exemption privileges to U.S.-registered aircraft, it has been determined, pursuant to 5 U.S.C. 553(d)(1) and (3), that a delayed effective date is not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "major rule" as defined in E.O. 12291; therefore, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Regulations Branch.

LIST OF SUBJECTS IN 19 CFR PART 10

Aircraft, Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements.

AMENDMENT TO THE REGULATIONS

To reflect the reciprocal privileges granted to aircraft registered in Singapore, Part 10, Customs Regulations (19 CFR Part 10), is amended as set forth below:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read, in part, as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * * * *

Section 10.59 also issued under 19 U.S.C. 1309, 1317;

* * * * * * *

2. In § 10.59, paragraph (f) is amended by adding, in appropriate alphabetical order, "Singapore" to the column headed "Country" and by adding 93–25" adjacent to Singapore" in the column headed Treasury Decision(s)".

Dated: April 2, 1993.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, April 8, 1993 (58 FR 18146)]

(T.D. 93–26)

TUNA FISH – TARIFF-RATE QUOTA

THE TARIFF-RATE QUOTA FOR THE CALENDAR YEAR 1993, ON TUNA CLASSIFIABLE UNDER ITEM 1604.14.20, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (HTSUS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1993.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 1604.14.20, HTSUS, is based on the United States canned tuna production for the preceding calendar year.

EFFECTIVE DATES: The 1993 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1993.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Chief, Quota Branch, Trade Programs Division, Office of Trade Operations, Office of Commercial Operations, U.S. Customs Service, Washington, D.C. 20229, (202–927–5401).

It has now been determined that 32,967,568 kilograms of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1993, at the rate of 6 percent ad valorem under item 1604.14.20, HTSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under item 1604.14.30 HTSUS.

Dated: March 30, 1993.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, April 8, 1993 (58 FR 18301)]

U.S. Customs Service

General Notices

APPLICATION FOR RECORDATION OF TRADE NAME: "DOVEX INCORPORATED"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "DOVEX INCORPORATED," used by Dovex Incorporated, a corporation organized under the laws of the State of California, located at 16610 Ventura Blvd., Encino, California 91436.

The application states that the trade name is used in connection with cookware. The merchandise is manufactured in Philippines.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before June 8, 1993.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20229 (202–482–6960).

Dated: April 5, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, April 9, 1993 (58 FR 18446)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 4–1993)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of February 1993 follow. The last notice was published in the CUSTOMS BULLETIN on March 17, 1993.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: April 5, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9300026	19930205	20130205	FROG LAWN ORNAMENTS	ART LINE, INC.	N
COP9300027	19930205	20130205	FLAMINGO LAWN AND GARDEN DECORATION	ART LINE, INC.	N
COP9300028	19930205	20130205	ROAD RUNNER LAWN ORNAMENT	ART LINE, INC.	N
COP9300029	19930205	20130205	BIRD LAWN AND GARDEN DECORATION	ART LINE, INC.	N
COP9300030	19930205	20130205	BIRD LAWN ORNAMENTS	ART LINE, INC.	N
COP9300031	19930212	20130212	CLARA THE LOVELY KITTEN	IWAYA CORP.	N
COP9300032	19930212	20130212	GREAT WOK 2000	MAX KER-SEYMER	N
COP9300033	19930217	20130217	WIND UP CRAWLING BABY "FAIRY-TALE" TROLL	HIP YICK INTERNATIONAL, INC.	N
COP9300034	19930217	20130217	CRAWLING NEW BORN "FAIRY-TALE" TROLL	HIP YICK INTERNATIONAL, INC.	N
COP9300035	19930217	20130217	SLICK - ACTION FIGURE	TYCO INDUSTRIES, INC.	N
COP9300036	19930217	20130217	SLICK	TYCO INDUSTRIES, INC.	N
COP9300037	19930222	20120222	PLAY ACTION FOOTBALL (DMG)	NINTENDO OF AMERICA INC.	N
COP9300038	19930222	20130222	E2937 TRIANGULAR SHAPED OPENWORK DROP	JEZLAINE, LTD.	N
COP9300039	19930222	20130222	E2371 LONG OPENWORK HEART DROP	JEZLAINE, LTD.	N
COP9300040	19930222	20130222	E3130 SMALL OPEN WORK HEART DROP	JEZLAINE, LTD.	N
COP9300041	19930222	20130222	E3079 LARGE FLAT OPEN WORK OVAL DROP	JEZLAINE, LTD.	N
COP9300042	19930222	20130222	E2303 OPENWORK DROP TRIANGLE	JEZLAINE, LTD.	N
COP9300043	19930222	20130222	E2391 OPENWORK HEART DROP	JEZLAINE, LTD.	N
COP9300044	19930222	20130222	E2684 FLOWING OPENWORK BAT DROP	JEZLAINE, LTD.	N
COP9300045	19930222	20130222	E2686 FLOWING OPENWORK OVAL DROP	JEZLAINE, LTD.	N
COP9300046	19930222	20130222	E2640 OPENWORK POINT HOOP EARRING	JEZLAINE, LTD.	N
COP9300047	19930222	20130222	E3326 FLOWER/LEAF HEART DROP EARRING	JEZLAINE, LTD.	N
COP9300048	19930222	20130222	E3243 OPENWORK HEART DROP EARRINGS	JEZLAINE, LTD.	N
COP9300049	19930222	20130222	E3008 OPENWORK LACE HOOP	JEZLAINE, LTD.	N
COP9300050	19930222	20120222	IBM DOS VERSION 5.0	INTERNATIONAL BUSINESS MACHINES	N
COP9300051	19930222	20130222	E2355 OPENWORK DOUBLE OVAL HOOP	JEZLAINE, LTD.	N
COP9300052	19930222	20130222	E2657 OPENWORK ROUND HOOP	JEZLAINE, LTD.	N
COP9300053	19930222	20130222	E3009 OPENWORK SCALLOPED HOOP	JEZLAINE, LTD.	N
COP9300054	19930222	20120222	HISPANIC BARBIE	MATTEL, INC.	N
COP9300055	19930222	20130222	P2239 PIN OPENWORK	JEZLAINE, LTD.	N
COP9300056	19930222	20130222	P2234 PIN OPENWORK BAR HEART DROPS	JEZLAINE LTD.	N
COP9300057	19930222	20130222	E2985 OPENWORK DOUBLE HOOP	JEZLAINE, LTD.	N
COP9300058	19930222	20130222	E3000 OPENWORK LACE DROPS	JEZLAINE LTD.	N
COP9300059	19930222	20130222	OPEN WORK CLIP BACK EARRING DESIGN E2982	JEZLAINE LTD.	N
COP9300060	19930222	20130222	MICROSOFT WINDOWS VERSION 3.1	MICROSOFT CORPORATION	N
COP9300061	19930223	20130223	PATTERN NO. 667	CONCORD FABRICS, INC.	N
COP9300062	19930223	20130223	PATTERN 812	CONCORD FABRICS, INC.	N
COP9300063	19930223	20130223	PATTERN 816	CONCORD FABRICS, INC.	N
COP9300064	19930223	20130223	PATTERN #558	CONCORD FABRICS, INC.	N
COP9300065	19930223	20130223	PATTERN 753A	CONCORD FABRICS, INC.	N
COP9300066	19930223	20130223	PATTERN #428	CONCORD FABRICS, INC.	N
COP9300068	19930223	20130223	PATTERN 7906	CONCORD FABRICS, INC.	N
COP9300069	19930223	20130223	PATTERN #8412L	CONCORD FABRICS, INC.	N
COP9300070	19930223	20130223	PATTERN #8411	CONCORD FABRICS, INC.	N
COP9300071	19930223	20130223	PATTERN 770A	CONCORD FABRICS, INC.	N
COP9300072	19930225	20130225	PLUSH TRAIN F603	WELL-MADE TOY MANUFACTURING CORP	N
COP9300073	19930225	20130225	DRAGON PUPPET F622	WELL-MADE TOY MANUFACTURING CORP	N
COP9300074	19930225	20130225	LAMB PUPPET F620	WELL-MADE TOY MANUFACTURING CORP	N
COP9300075	19930225	20130225	PATTERN NO. 8060	CONCORD FABRICS, INC.	N
COP9300076	19930225	20130225	PATTERN NO. 599	CONCORD FABRICS, INC.	N
COP9300077	19930225	20130225	ROBOCOP	ORION PICTURES CORPORATION	N

SUBTOTAL RECORDATION TYPE 51

03/25/93
23:47:10

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN FEBRUARY 1992

PAGE 2
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300076	19930202	20080130	PIONEER	MICHIGAN SUGAR CO.,	N
TMK9300077	19930202	19950614	COLONIAL	COLONIAL SUGARS, INC.	N
TMK9300078	19930202	20010924	SUGAR BOWL	SAVANNAH FOODS & INDUSTRIES	N
TMK9300079	19930202	19970723	DIXIE CRYSTALS	SAVANNAH FOODS & INDUSTRIES	N
TMK9300080	19930202	20020403	DIXIE CRYSTALS	SAVANNAH FOODS & INDUSTRIES	N
TMK9300081	19930202	20020331	? WITHIN A TRIANGLE	GUESS?, INC.	N
TMK9300082	19930202	20000306	GUESS? AND TRIANGLE DESIGN	GUESS?, INC.	N
TMK9300083	19930202	20070407	GUESS? WITHIN A TRIANGLE	GUESS?, INC.	N
TMK9300084	19930202	20010827	BUFFALO WITH DESIGN	GATEWAY PACIFIC CORP.	Y
TMK9300085	19930202	20071103	HEAD DESIGN OF BUFFALO	GATEWAY PACIFIC CORP.	Y
TMK9300086	19930202	20010414	BUFFALO WITH DESIGN	GATEWAY PACIFIC CORP.	Y
TMK9300087	19930202	20070908	BUFFALO WITH DESIGN	GATEWAY PACIFIC CORP.	Y
TMK9300088	19930202	20030315	BUFFALO	GATEWAY PACIFIC CORP.	Y
TMK9300089	19930202	20051228	EVERCANE	EVERGLADES SUGAR REFINERY, INC.	N
TMK9300090	19930208	19980103	BUTLER	JOHN O. BUTLER COMPANY	N
TMK9300091	19930208	20050507	BUTLER	JOHN O. BUTLER COMPANY	N
TMK9300092	19930208	20020511	PANORAMA	MCA, INC.	N
TMK9300093	19930208	20020602	MCA STYLIZED	MCA, INC.	N
TMK9300094	19930209	20020609	CLASSICA MADE CLEAR	MCA, INC.	N
TMK9300095	19930209	20010815	IMPULSE! STYLIZED	MCA RECORDS, INC.	N
TMK9300096	19930210	20010922	9 WEST	NINE WEST GROUP, INC.	Y
TMK9300097	19930210	20040710	CALICO AND DESIGN	NINE WEST GROUP, INC.	Y
TMK9300098	19930210	20041120	WESTIES	NINE WEST GROUP, INC.	Y
TMK9300099	19930210	20020505	NINE WEST STYLIZED	NINE WEST GROUP, INC.	Y
TMK9300100	19930210	20040626	9 WEST STYLIZED	NINE WEST GROUP, INC.	Y
TMK9300101	19930210	20000828	CALICO	NINE WEST GROUP, INC.	Y
TMK9300102	19930210	20000626	ULTRASOFT BY CALICO	NINE WEST GROUP, INC.	Y
TMK9300103	19930210	20000213	CALICO SOFIT	NINE WEST GROUP, INC.	Y
TMK9300104	19930210	20050827	ENZO ANGIOLINI	NINE WEST GROUP, INC.	Y
TMK9300105	19930210	20080621	WESTIES	NINE WEST GROUP, INC.	Y
TMK9300106	19930211	20010730	9 WEST	NINE WEST GROUP, INC.	Y
TMK9300107	19930212	20130212	KENSINGTON	KENSINGTON MICROWARE LIMITED	Y
TMK9300108	19930212	20130212	MASTER PIECE	KENSINGTON MICROWARE LIMITED	Y
TMK9300109	19930217	20000724	TREE DESIGN LOGO	TIMBERLAND COMPANY, THE	N
TMK9300110	19930217	20090822	TREE DESIGN LOGO	TIMBERLAND COMPANY, THE	N
TMK9300111	19930217	20080830	TREE DESIGN LOGO	TIMBERLAND COMPANY, THE	N
TMK9300112	19930217	20000828	TREE DESIGN LOGO	TIMBERLAND COMPANY, THE	N
TMK9300113	19930217	20000424	TIMBERLAND STYLIZED	TIMBERLAND COMPANY, THE	N
TMK9300114	19930217	20000424	TIMBERLAND STYLIZED	TIMBERLAND COMPANY, THE	N
TMK9300115	19930217	20090424	TIMBERLAND STYLIZED	TIMBERLAND COMPANY, THE	N
TMK9300116	19930217	20090424	TIMBERLAND STYLIZED	TIMBERLAND COMPANY, THE	N
TMK9300117	19930217	20020804	WEATHERGEAR	TIMBERLAND COMPANY, THE	N
TMK9300118	19930217	20011217	M AND DESIGN	MARS INCORPORATED	N
TMK9300119	19930217	20070113	BRAXTON	BRAXTON JEANS, INC.	N
TMK9300120	19930217	20021013	MISCELLANEOUS DESIGN	KYOWA INDUSTRIAL CO., LTD.	N
TMK9300121	19930218	20081018	BF AND DESIGN	CHIA MEI COSMETIC CO., LTD.	N
TMK9300122	19930218	20010730	LEHMANN AND TWIN CIRCLE PRESS AND SILHOUETTE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300123	19930219	20010604	LGB AND LOCOMOTIVE SILHOUETTE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300124	19930219	20010813	LGB AND NAMEPLATE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300125	19930219	20010806	LGB AND LOCOMOTIVE SILHOUETTE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300126	19930219	20010709	LEHMANN AND THIN CIRCLE PRESS AND SILHOUETTE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300127	19930219	20010709	LEHMANN AND THIN CIRCLE PRESS AND SILHOUETTE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300128	19930219	20010618	LGM AND LOCOMOTIVE SILHOUETTE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300129	19930219	20010806	LGB AND NAMEPLATE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9300130	19930222	20050521	OKIDATA	OKI ELECTRIC INDUSTRY CO., LTD.	N
TMK9300131	19930222	20050820	MICROLINE	OKI ELECTRIC INDUSTRY CO., LTD.	N
TMK9300132	19930222	20010826	OKIFAX	OKI ELECTRIC INDUSTRY CO., LTD.	N
TMK9300133	19930222	20041106	JONATHAN MARTIN & DESIGN	HARKHAM, INDUSTRIES, INC.	Y
TMK9300134	19930222	20060114	OKIFONT	OKI ELECTRIC INDUSTRY CO., LTD.	N
TMK9300135	19930222	20060909	JONATHAN MARTIN AND DESIGN	HARKHAM INDUSTRIES, INC.	Y
TMK9300136	19930222	20020710	AMUSEMENT BUSINESS	BPI COMMUNICATIONS L.P.	N
TMK9300137	19930222	19950531	BILLBOARD	BPI COMMUNICATIONS L.P.	N
TMK9300138	19930222	20061014	AB	BPI COMMUNICATIONS L.P.	N
TMK9300139	19930222	20021204	INTERIORS	BPI COMMUNICATIONS L.P.	N
TMK9300140	19930222	20011015	BILLBOARD	BPI COMMUNICATIONS L.P.	N
TMK9300141	19930222	20090307	BILLBOARD	BPI COMMUNICATIONS L.P.	N
TMK9300142	19930222	20040904	HERMES AVEC ATTELAGE	HERMES GESTION	N
TMK9300143	19930222	19930313	GERRY	GERRY SPORTSWEAR CORPORATION	N
TMK9300144	19930222	20021225	GERRY	GERRY SPORTSWEAR CORPORATION	N
TMK9300145	19930222	20050902	GERRY WITH DESIGN	GERRY SPORTSWEAR CORPORATION	N
TMK9300146	19930222	20050702	GERRY WITH DESIGN	GERRY SPORTSWEAR CORPORATION	N
TMK9300147	19930222	19951118	TEMPCO	GERRY SPORTSWEAR CORPORATION	N
TMK9300148	19930205	19930206	G WITH TRIANGLE DESIGN	GERRY SPORTSWEAR CORPORATION	N
TMK9300149	19930222	20030308	VANITY FAIR	ADVANCE MAGAZINE PUBLISHERS, INC	N
TMK9300150	19930222	20020602	GOLF BAG STRIPE	LYNX GOLF, INC.	Y
TMK9300151	19930222	20020721	IRIDESCENE	L.C. LICENSING, INC.	N
TMK9300152	19930222	20020721	LACE-UPS	L.C. LICENSING, INC.	N
TMK9300153	19930222	20020505	TRIANGULAR EARRING BACK DESIGN	L.C. LICENSING, INC.	N
TMK9300154	19930222	20020602	CLIP-ON EARRING DESIGN	L.C. LICENSING, INC.	N
TMK9300155	19930222	20020519	ELISABETH LIZ CLAIBORNE INC.	L.C. LICENSING, INC.	N
TMK9300156	19930222	20020818	LIZ & CO., LOGO IN RED SQUARE	L.C. LICENSING, INC.	N
TMK9300157	19930222	20020728	LC LIZ CLAIBORNE OVAL LOGO	L.C. LICENSING, INC.	N
TMK9300158	19930222	20020818	LIZ & CO.	L.C. LICENSING, INC.	N
TMK9300159	19930222	20020519	PIERCED EARRING DESIGN	L.C. LICENSING, INC.	N
TMK9300160	19930222	20000822	BRECK	DIAL CORPORATION	N
TMK9300161	19930222	20051203	NATIONAL BASEBALL HALL OF FAME	NATIONAL BASEBALL HALL OF FAME	N
TMK9300162	19930223	20071124	JDR MICRODEVICES	JDR MICRODEVICES	Y
TMK9300163	19930223	20080126	JDR	JDR MICRODEVICES	Y
TMK9300164	19930223	20021013	EARL'S	EARL'S SUPPLY COMPANY	N
TMK9300165	19930223	20020609	CARTRIDGE DESIGN	EVERPURE, INC.	N
TMK9300166	19930223	20060610	HALL OF FAME & DESIGN	NATIONAL BASEBALL HALL OF FAME	N
TMK9300167	19930225	20131025	HARLEY-DAVIDSON	HARLEY-DAVIDSON, INC.	N
TMK9300168	19930225	20011015	HARLEY-DAVIDSON MOTOR CYCLES WITH BAR AND SHIELD DESIGN	HARLEY-DAVIDSON, INC.	N
TMK9300169	19930225	20020908	BAR AND SHIELD	HARLEY-DAVIDSON, INC	N
TMK9300170	19930225	20020908	DESIGN OF A BOTTLE CONFIGURATION TRADEMARK	CALVIN KLEIN COSMETIC CORPORATIO	Y
TMK9300171	19930225	20020609	HARLEY-DAVIDSON LOGO	HARLEY-DAVIDSON. INC.	N

SUBTOTAL RECORDATION TYPE 96

TOTAL RECORDATIONS ADDED THIS MONTH 147

U.S. Court of Appeals for the Federal Circuit

UNITED STATES, PLAINTIFF-APPELLANT *v.* COCOA BERKAU, INC., AND WASHINGTON INTERNATIONAL INSURANCE CO., DEFENDANTS-APPELLEES

Appeal No. 92–1390

(Decided March 30, 1993)

Susan Burnett Mansfield, Senior Trial Counsel, Department of Justice, of New York, New York, argued for plaintiff-appellant. With her on the brief were *Stuart M. Gerson,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Ronald W. Gerdes, Sandler, Travis & Rosenberg, P.A., of Washington, D.C., argued for defendants-appellees. *Gilbert Lee Sandler,* Sandler, Travis & Rosenberg, P.A., of Miami, Florida, was on the brief for defendants-appellees.

Wayne Jarvis and *Michael G. Hodes,* Hodes & Pilon, of Chicago, Illinois, were on the brief for the Amicus Curiae, Old Republic Insurance Company.

Appealed from: U.S. Court of International Trade.
Judge GOLDBERG.

Before ARCHER, LOURIE, and SCHALL, *Circuit Judges.*

LOURIE, *Circuit Judge.*

The United States appeals from the judgment of the United States Court of International Trade granting the motion of Washington International Insurance Company to dismiss the government's action to recover liquidated damages as time-barred under 28 U.S.C. § 2415(a) (1988). *United States v. The Cocoa Berkau, Inc.,* 789 F. Supp. 1160 (Ct. Int'l Trade 1992). Because the government filed its complaint more than six years after its right of action accrued and the statute of limitations was not tolled by any administrative proceeding required by contract or by law, we affirm.

BACKGROUND

On March 6, 1984, The Cocoa Berkau, Inc., as principal, and Washington, as surety, executed and delivered to the U.S. Customs Service a single entry bond in the amount of $111,500 to secure the immediate delivery of sweet chocolate to be imported from Brazil. Paragraph 4 of the entry bond required Cocoa Berkau to redeliver, upon proper demand by Customs, any and all merchandise found not to comply with the law and regulations governing importation of the merchandise into the United States. It further provided that upon default of redelivery, Cocoa Berkau (and Washington, as its surety) would be liable for liquidated

damages as may be demanded by Customs, not to exceed the face amount of the bond.

On March 26, 1984, Cocoa Berkau entered 500 metric tons of sweet chocolate under item 156.20, Tariff Schedules of the United States (TSUS). An entry summary for consumption was submitted to Customs and it was eventually accepted. At the time of entry, a sample of the imported merchandise was taken by Customs for laboratory testing. Customs' analysis of the sample revealed that the imported merchandise contained milk solids, properly classified under item 156.30, TSUS. Merchandise so classified was subject to an import quota under item 950.16, TSUS.

Consequently, on January 31, 1985, Customs issued a notice ordering Cocoa Berkau to redeliver the imported merchandise to Customs within 30 days from the date of the notice. The notice was mailed to Cocoa Berkau at its address of record. A second notice to redeliver, dated February 11, 1985, was mailed to Cocoa Berkau at a new address. Cocoa Berkau subsequently advised Customs that the imported merchandise could not be redelivered to Customs because it had already been sold. The imported merchandise was never redelivered to Customs.

Customs determined that Cocoa Berkau's failure to redeliver the imported merchandise upon demand constituted a breach of the bond. On June 26, 1985, Customs demanded payment from Cocoa Berkau of liquidated damages in the amount of $1,114,812 to be paid within 60 days. Cocoa Berkau did not pay these damages.[1]

On March 18, 1988, Customs liquidated the imported merchandise under item 156.20, TSUS, under which the merchandise was originally entered. On November 30, 1990, formal demand for $111,500 in liquidated damages was made on Washington for Cocoa Berkau's breach of the entry bond, to be paid within 30 days. That amount represented the face amount of the bond which Washington executed as bond surety. On December 28, 1990, Washington petitioned for mitigation relief and that petition was denied by Customs on July 19, 1991.

On August 22, 1991, the government filed suit against Cocoa Berkau and Washington in the U.S. Court of International Trade to recover the $111,500, plus pre-judgment and post-judgment interest and costs. Washington moved for dismissal on the ground that the government failed to timely file its complaint within the six-year limitations period of 28 U.S.C. § 2415(a). Washington argued that the government's right of action accrued no later than March 13, 1985, when the bond was breached by the principal. The government claimed that its right of action accrued on December 30, 1990, when the surety defaulted on its obligation under the bond.

The trial court granted Washington's motion to dismiss. The trial court determined that in an action for breach of an entry bond, the six-

[1] The $1,114,812 assessed by Customs represented the entered value of the imported merchandise. In response to the assessment, Cocoa Berkau filed a petition for relief from Customs' demand. In a decision dated June 12, 1986, Customs advised Cocoa Berkau that the claim for liquidated damages would be mitigated to $557,406. Cocoa Berkau then filed a supplemental petition for relief, which was denied on March 12, 1987.

year limitations period of 28 U.S.C. § 2415(a) begins to run on the importer's breach of its bond, which in the instant case occurred no later than March 13, 1985, when Cocoa Berkau failed to redeliver the imported merchandise within 30 days of Customs' demand for redelivery. Because the government's complaint was filed on August 22, 1991, more than six years after the government's right of action accrued, the trial court concluded that the action was time-barred under section 2415(a).

The trial court also rejected the government's alternative argument that the mitigation proceeding initiated by Washington tolled the limitations period until July 19, 1991, when Customs rendered a final decision denying Washington's request for relief. The trial court determined that the limitations period under section 2415(a) is tolled only by mandatory administrative proceedings. It concluded that the mitigation proceeding at issue was not required by law or by the entry bond, but was "merely a permissive administrative proceeding instigated by [Washington]" which did not operate to toll the limitations period.

DISCUSSION

Whether the trial court properly granted the motion to dismiss is a question of law that we review *de novo*. *See Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). In the instant case, that inquiry turns on the proper interpretation of the governing statute, which is also a legal question that we review *de novo*. See Guess? Inc. v. United States, 944 F.2d 855, 857 (Fed. Cir. 1991). In reviewing the propriety of the dismissal, we must consider the facts alleged in the complaint to be correct. *The Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1568–69 (Fed. Cir. 1993).

I. *Accrual of Right of Action:*

The applicable statute of limitations, 28 U.S.C. § 2415(a), provides that an action brought by the government for money damages on a contract must be filed "within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later." In the instant case, the issue whether section 2415(a) applies to bar the government's suit to recover liquidated damages for breach of the entry bond turns on the date on which the government's right of action accrued.

The law is well settled that, as a general rule, a claim does not accrue until all events necessary to fix the liability of a defendant have occurred.[2] *The Catawba Indian Tribe*, 982 F.2d at 1570; *United States v. Commodities Export Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992) ("'[A] cause of action accrues when all events necessary to state a claim have

[2] This general rule of accrual applies whether the language of the statute of limitations speaks of a "right of action," *see, e.g.*, 28 U.S.C. §§ 2401, 2415(a) (1988), or of a "claim," *see, e.g.*, 28 U.S.C. § 2501 (1988). Thus, we reject the government's argument that the date that its "right of action" accrued under section 2415(a) is different from the date its "cause of action" accrued. *See United States v. Commodities Export Co.*, 972 F.2d 1266, 1270–71 (Fed. Cir. 1992) (terms "cause of action" and "right of action" used interchangeably), *cert. denied*, 122 L. Ed. 2d 654 (1993).

occurred.'") (quoting *Chevron U.S.A. Inc. v. United States,* 923 F.2d 830, 834 (Fed. Cir.), *cert. denied,* 112 S. Ct. 167 (1991)), *cert. denied,* 122 L. Ed. 2d 654 (1993). With respect to a claim arising from a bond, it is equally well settled that the date of accrual occurs at the time of the breach of the bond. *See United States v. Reul,* 959 F.2d 1572, 1576 (Fed. Cir. 1992). The parties do not quarrel with these established legal principles. The critical issue on appeal is which event, the default of redelivery by the bond principal or the default of payment of liquidated damages by the bond surety, constituted the breach of the bond which fixed liability for purposes of triggering the statute of limitations.

The government argues that the trial court erred in determining that the government's right of action accrued when the bond principal failed to redeliver the imported merchandise to Customs upon demand. The government characterizes its suit as one against the bond surety to recover liquidated damages. Thus, it claims that its right of action did not accrue until Washington breached the bond by failing to pay liquidated damages within 30 days of the November 30, 1990 notice demanding payment. Because the action was commenced on August 22, 1991, within six years of that date, the government maintains that its complaint was timely filed. We disagree.

In order to determine when the entry bond was breached, we look to the language of the bond stipulating the relevant obligations of the bond principal and its surety. The government's action for liquidated damages arose from an alleged breach of paragraph 4 of the entry bond. That provision required, *inter alia,* that the

> principal shall redeliver or cause to be redelivered to [Customs], on demand * * * any and all merchandise found not to comply with law and regulations governing its admission into the commerce of the United States * * * or in default of redelivery after a proper demand * * * the principal [or surety] shall pay to [Customs] such amounts as liquidated damages as may be demanded by [Customs.]

Thus, the entry bond placed an obligation on the bond principal to redeliver the imported merchandise upon a proper demand by Customs. The bond was breached, and thus the government's right of action accrued, when the principal failed to redeliver upon proper demand, not when the surety failed to pay liquidated damages. This interpretation of paragraph 4 is controlled by *United States v. Reul,* 959 F.2d 1572 (Fed. Cir. 1992), in which the identical bond provision was at issue. In *Reul,* we determined that the default of redelivery by the bond principal constituted a breach of the bond, at which point a suit for the consequences of such default accrued for purposes of 28 U.S.C. § 2415(a). *Id.* at 1576.

Contrary to the assertion of the government, the entry bond did not expressly require Customs to demand payment of liquidated damages from the surety before a suit to recover such damages could be instituted. Absent an agreement between the parties, the surety incurs derivative liability when the principal breaches the bond. *See United States v. Commodities Export Co.,* 972 F.2d at 1271 n.2. In the instant

case, the bond merely stipulated that upon a "default of redelivery" by the principal, the principal (and its surety) would be liable for liquidated damages "as may be demanded" by Customs. Washington's duty as bond surety to pay liquidated damages arose as a consequence of the default of redelivery by the principal, not on a demand for the damages by the government. The demand made by Customs upon the surety was merely a procedural step for obtaining the damages and did not in itself create liability. *See* 19 C.F.R. § 172.1(a) (1992) ("The sureties on such bond shall also be advised in writing, at the same time as the principal, of the liability for liquidated damages incurred by the principal.").

Furthermore, in the absence of an express agreement between the parties, to accept the government's interpretation that its right of action accrues only when demand for liquidated damages is made on the surety would subvert the purpose of the statute of limitations, which is intended to ensure that actions are brought in a timely fashion, before they become stale. *See* S. Rep. No. 1328, 89th Cong., 2d Sess. ____, *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503. As we recognized in *Commodities Export,* that purpose is

> not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

972 F.2d at 1271 n.3. Thus, we cannot "permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations." *Id.* at 1271. The accrual of a right of action should occur upon default by a liable party, not when a creditor takes steps to procure performance.

In support of its position that its right of action accrued when the surety failed to pay upon demand, the government relies on our holding in *Reul* that no prejudgment interest on a principal's debt arising from its breach of a bond runs against a surety unless requisite notice and demand for payment is first made on the surety. 959 F.2d at 1581. The government's reliance on *Reul,* however, is inapposite because the question concerning when prejudgment interest begins to run against the surety is not at issue here. Nothing in *Reul's* discussion regarding prejudgment interest contradicts our interpretation of the bond provision at issue. The date of accrual of interest does not necessarily govern the date of accrual of a right of action; one may be liable for a debt before being liable for interest.

We hold that the failure of the bond principal to redeliver the imported merchandise upon demand by Customs constituted a breach of its obligation under the entry bond; it thus was the triggering event which commenced the running of the statute of limitations. In the instant case, that breach occurred no later than March 13, 1985, 30 days after Cocoa Berkau failed to redeliver the imported merchandise to

Customs upon demand. Because the government did not file its complaint within six years thereafter, it was barred under the statute of limitations.

II. *Tolling by Administrative Proceedings:*

Alternatively, the government contends that even if the complaint were not filed within six years after its right of action accrued, its suit was still timely because it was filed within one year after a final decision was rendered by Customs denying Washington's request for administrative relief. Section 2415(a) provides that the government's suit for money damages on a contract must be filed within six years after the right of action accrues or "within one year after final decisions have been rendered in applicable administrative proceedings *required by contract or by law,* whichever is later." 28 U.S.C. § 2415(a) (emphasis added).

The government claims that on December 30, 1990, Washington petitioned for relief from the demand for liquidated damages under 19 U.S.C. § 1623(c) (1988) and that Customs denied this petition on July 19, 1991.[3] Because this suit was filed within a year of that decision, the government argues that it was timely filed under the "tolling provision" of section 2415(a). We disagree. It is undisputed that the entry bond did not require Washington to pursue administrative relief before the government could file an action for liquidated damages. Nor did the bond provide any procedure for dispute resolution which could be considered a condition precedent to bringing suit. Thus, the mitigation proceedings initiated by Washington were not "required by contract." As is discussed below, neither were they "required by law."

The government argues that although the decision to pursue mitigation remedies under section 1623(c) was completely voluntary on the part of the surety,[4] the government was nevertheless required to allow the surety to pursue those remedies. Once the surety elected to do so, the government claims that it was barred from recovering on its claim through a civil action until the mitigation proceedings were concluded. That argument, however, is not supported by the statute.

First, we observe that nothing in either the express language or the legislative history of section 1623(c) indicates that Congress intended that a bond surety be required to file a petition for mitigation or that such a petition must be filed before the government can bring suit to recover liquidated damages. Section 1623(c) provides in pertinent part that

> [t]he Secretary of the Treasury *may* authorize the cancellation of any bond provided for in this section, or of any charge that may have

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[3] Washington disputes whether its December 28, 1990 letter to Customs can be considered a petition for mitigation. For purposes of this opinion we will consider it as such. Although the trial court cited 19 U.S.C. § 1618 (1988) as the basis for relief, the parties agree that 19 U.S.C. § 1623(c) is the appropriate authority. Thus, we do not reach the question whether a proceeding under section 1618 is one "required by contract or by law" within the meaning of 28 U.S.C. § 2415(a).

[4] *See, e.g.,* 19 C.F.R. § 172.1(b) (1992) ("The notice [for liquidated damages] shall also inform the principal and his sureties on the bond that application *may* be made for relief under [19 U.S.C. § 1623(c)] * * *.") (emphasis added).

> been made against such bond, in the event of a breach of any condition of the bond, upon the payment of such lesser amount or penalty or upon such other terms and conditions as he may deem sufficient.

19 U.S.C. § 1623(c) (1988) (emphasis added). From its permissive terms it is clear that the determination whether to authorize cancellation of a bond under section 1623(c) falls within the discretion of the Secretary of the Treasury. *See also* 19 C.F.R. § 172.21 (1992) ("[Customs] may cancel any claim for liquidated damages * * * [it] shall deem appropriate * * *."). That the Secretary was somehow "required" to consider whether to exercise his discretionary authority once the surety petitioned for mitigation relief does not establish that the section 1623(c) proceeding was one "required by law" within the meaning of 28 U.S.C. § 2415(a).

Congress, in enacting the statute of limitations, explained that

> [the tolling] provision, which has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes. An administrative proceeding ordinarily consumes a considerable period of time and * * * the [statute] would permit the Government a year after the final administrative decision in which to present its case for judicial determination. An example of such an administrative proceeding are those which involve appeals under the "disputes" clause of Government contracts.

S. Rep. No. 1328, 89th Cong., 2d Sess. ___ (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2504. Hence, Congress contemplated that certain types of mandatory administrative proceedings could reasonably be expected to consume a substantial portion of the six-year limitations period, and it thus allowed for the tolling of section 2415(a) in order to accommodate this circumstance.

Congress specifically identified appeals under the "disputes" clause of government contracts as illustrative of the type of administrative proceedings that may toll the limitations period. At the time of the enactment of section 2415(a), disputes clauses generally required that "all disputes concerning a question of fact arising under this contract" be decided by the contracting officer. Such disputes clauses typically delineated a procedure for administrative review of the contracting officer's decision, whereby

> [a]ppeals from the decision of the contracting officer [were] characteristically heard by a board or committee designated by the head of the contracting department or agency. Should the contractor be dissatisfied with the administrative decision * * * [he could] bring a Tucker Act suit for breach of contract in the Court of Claims or the District Court, 28 U.S.C. § 1346(a)(2) (1964 ed.), the finality accorded administrative fact finding by the disputes clause [being] limited by the provisions of the Wunderlich Act of 1954 * * *.

United States v. Utah Constr. & Mining Co., 384 U.S. 394, 399 (1966). The appeals procedure outlined by the disputes clauses also provided

that "the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal." *See, e.g., United States v. Ulvedal,* 372 F.2d 31, 32 n.1 (8th Cir. 1967). Moreover, the contractor was required to exhaust his administrative appeal right as provided under the disputes clauses before bringing suit on a claim arising under the contract. *See United States v. Joseph A. Holpuch Co.,* 328 U.S. 234, 239–40 (1946).

The extensive administrative review procedures set out in pre–1978 disputes clauses stand in marked contrast to the discretionary and summary nature of mitigation proceedings under 19 U.S.C. § 1623(c). A party seeking mitigation relief is offered none of the procedural protections which were part of disputes clause appeals when section 2415(a) was enacted. Although a party may file an administrative appeal from a decision denying mitigation relief, such appeals are based only upon written submissions and do not provide for a hearing of any kind. *See* 19 C.F.R. § 172.33 (1992). Mitigation proceedings pursuant to section 1623(c) are not analogous to the formal and time-consuming administrative proceedings which Congress permitted to toll the statute of limitations in the government contract setting.

We hold that the surety's mitigation proceeding under 19 U.S.C. § 1623(c) was not an "administrative proceeding required by contract or by law" within the meaning of 28 U.S.C. § 2415(a); it thus did not toll the running of the limitations period.

CONCLUSION

Because the government's complaint seeking liquidated damages for breach of an entry bond was filed more than six years after its right of action accrued and because the surety's mitigation proceeding did not toll the statute of limitations, the trial court's judgment dismissing the government's action is

AFFIRMED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–44)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP., MINEBEA CO., LTD., NMB CORP., AND CATERPILLAR INC., DEFENDANT-INTERVENORS

Court No. 91–08–00569

Plaintiff challenges the following actions by the Department of Commerce, International Trade Administration ("ITA"), alleging that these actions were unsupported by substantial evidence on the administrative record and not in accordance with law: the ITA's (1) use of a methodology for adjusting United States price ("USP") and Foreign Market Value ("FMV") for the Japanese value added tax ("VAT") that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) method of calculating cash deposit rates for estimated duties; (3) treatment of antifriction bearings imported into foreign trade zones ("FTZ"); (4) treatment of antifriction bearings imported by related parties and reexported; (5) in regard to ESP transactions, allowance of an adjustment to FMV for inventory carrying costs; (6) allowance of an adjustment to FMV for alleged post sale price adjustments ("PSPAs") and rebates; and (7) calculation of the adjustment for home market credit costs for Koyo Seiko Co., Ltd. Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), now move pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record requesting this Court to affirm the ITA's actions with regard to these issues.

Held: This case is remanded to the ITA to add the full amount of VAT paid on each sale in the home market to FMV without adjustment and to develop a methodology which removes PSPAs and rebates paid on sales of out of scope merchandise from any adjustment made to FMV for PSPAs and rebates or to deny such an adjustment if a viable method cannot be found. ITA's determination is affirmed in all other respects.

[Defendant-intervenor Koyo's motion granted in part and denied in part; case remanded to the ITA.]

(Dated March 29, 1993)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Margaret E. O. Edozien, John N. Breen, Jane S. Hurewitz, Patrick J. McDonough, Robert A. Weaver* and *Amy S. Dwyer*) for plaintiff The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for plaintiff-intervenor Federal-Mogul Corporation.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis* and *Jane E. Meehan*); of counsel: *John D. McInerny*, Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert* and *Stephen J. Claeys*, Attorney-Advisors, Office

of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy; (Peter O. Suchman, Neil R. Ellis, Susan E. Silver, T. George Davis and *Niall P. Meagher*) for defendant-intervenor Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Powell, Goldstein, Frazer & Murphy (*Richard M. Belanger, Neil R. Ellis* and *P. Christine Wood*) for defendant-intervenor Caterpillar, Inc.

Tanaka Ritger & Middleton (*H. William Tanaka, Michele N. Tanaka* and *Michael J. Brown*) for defendant-intervenor Minebea Co., Ltd. and NMB Corporation.

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger, Kazumune V. Kano* and *Diane A. MacDonald*) for defendant-intervenor NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Coudert Brothers (*Robert A. Lipstein, Matthew P. Jaffe* and *Nathan V. Holt*) for defendant-intervenor NSK Ltd. and NSK Corporation.

Venable, Baetjer, Howard & Civiletti (*John M. Gurley*) for defendant-intervenor Peer Bearing Company.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 56 Fed. Reg. 31,754 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("*Issues Appendix*"), 56 Fed. Reg. 31,692 (1991).

Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), now move pursuant to Rule 56.1 of the rules of this Court for partial judgment on the agency record in regard to certain claims which may affect Koyo raised by Torrington in its challenge to certain aspects of the ITA's Final Results.

BACKGROUND

On June 11, 1990, the ITA initiated an administrative review of imports of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990).

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings Other Than Tapered Roller Bearings) and Parts thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews* ("*Preliminary Results*"), 56 Fed. Reg. 11,186 (1991). In the Preliminary Results,

the ITA calculated that Koyo's margin for ball bearings was 0.49% and Koyo's margin for cylindrical roller bearings was 0.02%. Koyo had no sales of spherical plain bearings during the period of review. *Preliminary Results,* 56 Fed. Reg. at 11,189.

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. 31,754. The ITA calculated margins of 9.82% for Koyo's ball bearings and 1.45% for Koyo's cylindrical roller bearings. *Id.* at 31,756.

A decision by this Court on some of the issues raised by Torrington may have an impact on the dumping margin calculated for defendant-intervenor Koyo.

Torrington has challenged the following actions by the ITA which may impact Koyo's dumping margin alleging that these actions were unsupported by substantial evidence on the administrative record and not in accordance with law: the ITA's (1) use of a methodology for adjusting United States price ("USP")[1] and Foreign Market Value ("FMV")[2] for the Japanese value added tax ("VAT") that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) method of calculating cash deposit rates for estimated duties; (3) treatment of antifriction bearings imported into foreign trade zones ("FTZ"); (4) treatment of antifriction bearings imported by related parties and re-exported; (5) in regard to exporter sales price ("ESP") transactions, allowance of an adjustment to FMV for inventory carrying costs; (6) allowance of an adjustment to FMV for alleged post sale price adjustments and rebates; and (7) calculation of the adjustment for home market credit costs for Koyo Seiko Co., Ltd. *Plaintiff's Response to Defendant-intervenors' Motion for Judgment on the Agency Record* ("*Torrington's Response*") at 22–69.

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[1] Purchase price and exporter's sales price ("ESP") are the two types of United States price. USP, purchase price and ESP are defined at 19 U.S.C. § 1677a (1988):

> **(a) United States price**
> [T]he term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> **(b) Purchase price**
> "[P]urchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.
>
> **(c) Exporter's sales price**
> "[E]xporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *.

The purchase price is normally used as USP where the transaction prior to importation is between unrelated parties, or at arm's length. The exporter's sales price will be used as the USP when the U.S. importer and the foreign seller are "related parties." *See* 19 U.S.C. § 1677(13) (1988). The exporter's sales price will be the price at which the merchandise is first sold to an unrelated purchaser in the United States. 19 U.S.C. § 1677a(c).

[2] In an administrative review, the ITA is required to calculate "the [FMV] and [USP] of each entry of merchandise subject to the antidumping duty order" and determine "the amount, if any, by which the [FMV] of each such entry exceeds the [USP] of the entry." 19 U.S.C. § 1675(a)(2) (1988).
19 U.S.C. § 1677b(a) (1988) defines FMV:

> **(1) In general**
> The foreign market value of imported merchandise shall be the price, * * *
>
> (A) at which such or similar merchandise is sold * * * in the principal markets of the country from which exported * * *, or
>
> (B) if not sold or offered for sale for home consumption, * * * then the price at which so sold or offered for sale for exportation to countries other than the United States,
>
> * * * * * * *

DISCUSSION

This Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Circumstance of Sale Adjustment to FMV for Value Added Tax:*

At issue here is the ITA's treatment of the Japanese VAT pursuant to 19 U.S.C. § 1677a(d)(1)(C) (1988) which states:

> **(d) Adjustments to purchase price and exporter's sales price**
>
> The purchase price and the exporter's sales price shall be adjusted by being—
>
> (1) increased by—
>
> * * * * * * *
>
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; * * *.

In the Final Results, the ITA explained its treatment of VATs follows:

> We calculated the addition to USP by applying the [home market] tax rate to the net U.S. price after all other adjustments were made. This imputed tax amount is BIA, because HM sales were reported net of VAT, and we are thus unable to determine what the home market tax base was.
>
> * * * * * * *
>
> Because all HM sales were reported net of VAT, we added the same VAT amount to FMV as that calculated for USP. This is equivalent to calculating the actual HM tax, and then performing a circumstance-of-sale adjustment to FMV to eliminate the absolute difference between the amount of tax in each market.

Issues Appendix, 56 Fed. Reg. at 31,729.

NSK Ltd. and NSK Corporation ("NSK") argue that the statute does not require that FMV contain home market excise taxes and that in situations, as here, where FMV is reported net tax no adjustment need be made to FMV. *Memorandum of Points and Authorities in Support of*

Koyo's Motion for Judgment on the Agency Record ("*NSK's Memorandum*") at 26–32.

This Court does not agree. The plain language of 19 U.S.C. § 1677a(d)(1)(C) requires that USP be increased by the amount of any indirect tax imposed on sales of the subject merchandise in the home market, regardless of whether FMV is reported net tax or not. *Zenith Elecs. Corp. v. United States*, 10 CIT 268, 275–82, 633 F. Supp. 1382, 1388–94 (1986), *appeal dismissed*, 875 F.2d 291 (Fed. Cir. 1989). Clearly the statute anticipates a comparison between FMV and USP with indirect taxes included in both prices. Therefore, in cases such as this where FMV is reported net tax, it is necessary for the ITA to add the indirect tax back into FMV. The question before this Court is whether the ITA should add the full amount of VAT paid on a home market sale back into FMV or only add an amount equal to the adjustment made to USP pursuant to 19 U.S.C. § 1677a(d)(1)(C) in order to maintain tax neutrality.

In its treatment of the Japanese VAT the ITA tried to achieve tax neutrality by eliminating the absolute difference between the VAT amount paid on a home market sale and the addition for the Japanese VAT made to the comparable U.S. sale price by making a circumstance of sale adjustment to FMV pursuant to 19 U.S.C. § 1677b(a)(4)(B) (1988).[3] The ITA explained its methodology in the Final Results as follows:

> Because all HM sales were reported net of VAT, we added the same VAT amount to FMV as that calculated for USP. This is equivalent to calculating the actual HM tax, and then performing a circumstance-of-sale adjustment to FMV to eliminate the absolute difference between the amount of tax in each market.

Issues Appendix, 56 Fed. Reg. at 31,729.

ITA believes that the General Agreement on Tariffs and Trade ("GATT") requires the ITA to calculate tax neutral dumping margins.[4]

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[3] 19 U.S.C. § 1677b(a)(4)(B) states in relevant part:

> **(4) Other adjustments**
> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
>
> * * * * * * *
>
> (B) other differences in circumstances of sale; or
>
> * * * * * * *
>
> then due allowance shall be made therefor.

See also 19 C.F.R. § 353.56(a) (1991).

[4] Article VI (4) of the GATT states:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. (5),(6), T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1948).

Article 2, paragraph 6, of the GATT Antidumping Code states:

> In order to effect a fair comparison between the export price and the domestic price in the exporting country * * * [d]ue allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability.

Article 2(6) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature* April 12, 1979, 31 U.S.T. 4920, 4926 (1981).

Defendant's Memorandum in Response to the Motion of Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., for Judgment upon the Agency Record ("*Defendant's Response*") at 51–54.

ITA also believes that 19 U.S.C. § 1677b(a)(4)(B) gives the ITA broad authority to grant COS adjustments and "that differences in taxation are essentially no different than any other difference in expenses between the two markets" and therefore qualify for a COS adjustment. *Id.* at 42–43. In support of its contention that the ITA has broad authority to make COS adjustments to achieve tax neutrality, the ITA relies upon *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). *Defendant's Response* at 44–47. Koyo, NSK and NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation ("NTN") essentially agree with the ITA's position. *Memorandum of Points and Authorities in Support of Defendant-intervenors' Motion for Judgment on the Agency Record* ("*Koyo's Memorandum*") at 34–44; *Defendant-intervenors' Reply to Plaintiff's Response to Defendant-intervenors' Motion for Judgment on the Agency Record* ("*Koyo's Reply*") at 15–21; *Reply Brief of Defendant-intervenor NTN Bearing Corporation of America, American NTN Bearing Corporation, and NTN Corporation* ("*NTN's Reply*") at 720; *NSK's Response* at 32–35.

In *Smith-Corona* the ITA used 19 U.S.C. § 1677b(a)(4)(B) to grant an "exporter's sales price offset" to FMV for adjustments to ESP for indirect costs. The language of 19 U.S.C. § 1677b(a)(4)(B) had been interpreted to allow only COS adjustments for "direct costs." The Court of Appeals for the Federal Circuit found that the ITA has broad authority to grant COS adjustments pursuant to 19 U.S.C. § 1677b(a)(4)(B) and that a COS adjustment to offset the adjustment to ESP for indirect costs was necessary "to guarantee that the administering authority makes the fair value comparison on a fair basis – comparing apples with apples" even though the adjustment is not being made for direct costs. *Smith-Corona*, 713 F.2d at 1578.

Torrington argues that the antidumping duty statute does not require or permit adjustments for commodity taxes to be made in a way which achieves tax neutrality and that while the ITA's methodology may be tax neutral it is not dumping margin neutral. *Torrington's Response* at 44–46.

This Court has fully addressed these arguments and adheres to its decision on this issue in *Federal-Mogul Corp. v. United States*, 17 CIT ____, ____, Slip Op. 93–17 at 15–22 (February 4, 1993). This Court remands this issue to the ITA to allow the ITA to add the full amount of VAT paid on home market sales to FMV without adjustment in conformity with this Court's remand instructions in *Federal-Mogul*, 17 CIT at ____, Slip Op. 93–17 at 41.

2. *Calculation of Cash Deposit Rates:*

In this administrative review, the ITA used two different methodologies for the actual calculation of the dumping margins in cases where

ESP sales were used: one for assessing duties on entries covered by the review, and the other for setting the cash deposit rate on future entries of the subject merchandise. *Final Results,* 56 Fed. Reg. at 31,756–57; *Issues Appendix,* 56 Fed. Reg. at 31,698–702. To calculate the assessment rate for ESP sales, the ITA "divide[d] the total PUDD [potential uncollected dumping duties – calculated as the total difference between foreign market value and U.S. price for an exporter] for the reviewed sales by the *total entered value* of those reviewed sales * * *." *Issues Appendix,* 56 Fed. Reg. at 31,698–99 (emphasis added). To calculate the estimated cash deposit rate for ESP sales, the ITA "divided the total PUDD for each exporter by the *total net U.S. price* for that exporter's sales * * *." *Id.* at 31,699 (emphasis added).

Torrington argues that the ITA's use of a methodology which results in an estimated cash deposit rate different from the assessment duty rate was unsupported by substantial evidence on the record and not in accordance with law. *Torrington's Response* at 22–30. Specifically, Torrington contends that since the cash deposit rate is applied to the entered value of future entries, the ITA's policy of calculating this rate as a percentage of statutory USP rather than as a percentage of the entered value results in an under collection of cash deposits on future entries. *Id.* at 22–23.

In order to avoid this under collection, Torrington suggests that a more accurate method for calculating the deposit rate is to represent the antidumping duty as a percentage of the entry's entered value. This is the method that the ITA used for calculating the assessment rate. *Id.*

Among other arguments, the defendant, Koyo and NSK contend that there is no statute or case law requiring the cash deposit rate to equal the duty assessment rate. *Defendant's Response* at 9–10; *Koyo's Memorandum* at 25; *NSK's Memorandum* at 15–16. Moreover, the defendant and Koyo argue that the ITA is not required to use an identical methodology for computing both assessment rates and cash deposit rates. *Defendant's Response* at 6–7; *Koyo's Memorandum* at 25–27.

This Court has fully addressed these arguments and adheres to its decision on this issue in *Federal-Mogul Corp.,* 17 CIT at ____, Slip Op. 93–17 at 24–29. Therefore, this Court finds that the methodology used by the ITA in this review is reasonable and in accordance with law. *See also Zenith Elecs. Corp. v. United States,* 15 CIT ____, ____, 770 F. Supp. 648, 655 (1991); *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 283, 712 F. Supp. 931, 957 (1989).

3. *Treatment of Antifriction Bearings Imported into Foreign Trade Zones:*

Torrington challenges the ITA's treatment of antifriction bearings ("AFBs") imported into the U.S. through foreign trade zones.

Section 81b of Title 19, United States Code, provides authority for the Secretary of Commerce to set up foreign trade zones ("FTZ") at U.S. ports of entry. This process is supervised by the Foreign Trade Zones Board and the U.S. Customs Service ("Customs"). 19 U.S.C. § 81b

(1988). Pursuant to the statute, merchandise brought into a FTZ may be exempt from U.S. customs laws. The relevant provisions of 19 U.S.C. § 81c(a) (1988) state:

> **(a) Handling of merchandise in zone; shipment of foreign merchandise into customs territory; appraisal; reshipment to zone**
>
> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, *without being subject to the customs laws of the United States,* except as otherwise provided in this chapter, be brought into a zone and may be * * * mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into customs territory of the United states therefrom, in the original package or otherwise; *but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise: Provided,* That whenever the privilege shall be requested and there has been no manipulation or manufacture effecting a change in tariff classification, the appropriate customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be * * * manufactured under the supervision and regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not may, under regulations prescribed by the Secretary of the Treasury, be exported or destroyed, or may be sent into customs territory upon the payment of such liquidated duties and determined taxes thereon.

(Emphasis added).

In the Final Results the ITA included all imports of AFBs from FTZs which entered U.S. Customs territory as AFBs in its calculation of dumping margins but concluded that:

> To the extent that any sales of the subject merchandise were admitted into a FTZ and transformed into merchandise not covered by these orders (e.g., automobiles) before entry into U.S. Customs territory, the Department currently has no basis for the assessment of antidumping duties on the merchandise.

Issues Appendix, 56 Fed. Reg. at 31,704.

Torrington alleges that the ITA's failure to require the deposit of estimated antidumping duties upon import of antifriction bearings into

FTZs and the failure to require importers to elect "privileged"[5] status for imports of such merchandise was not in accordance with law. *Torrington's Response* at 30–42.

Torrington argues that the focus of antidumping duty orders is on importation of subject merchandise and that importation occurs when the AFBs enter the geographic U.S. and not on when the merchandise is formally entered into the U.S. Customs territory. *Id.* at 38–39.[6] In addition, Torrington points out that foreign merchandise within a FTZ is considered imported for purposes of all U.S. laws except "the customs laws of the United States." *See* 19 U.S.C. § 81c(a). Torrington argues that the antidumping duty statute is not part of the customs laws of the United States. *Torrington's Response* at 33, 39. Therefore, the ITA should be required to order Customs to require the deposit of estimated antidumping duties upon the importation of AFBs into all FTZs.

Torrington also argues that the ITA was wrong in not requiring importers of AFBs to elect privileged status for their imports into FTZs. By requiring the election of privileged status, AFBs incorporated into merchandise not covered by these antidumping duty orders would still be subject to assessment of antidumping duties upon entry into the U.S. Customs territory and liquidation of the new merchandise which includes the subject AFBs. *Id.* at 33–34. Torrington states that the ITA implicitly agrees with its position because the Foreign Trade Zone Board, in conjunction with the ITA, had proposed regulations which would require importers of merchandise which is subject to an antidumping duty order into a FTZ to elect privileged status for the merchandise. *Id.; see* 15 C.F.R. § 400.33(b) (1992) (entered into force April 6, 1992).

---

[5] Pursuant to 19 U.S.C. § 81c(a), the U.S. Customs Service has promulgated regulations regarding the operation of FTZs.

Upon entry of merchandise into a FTZ, an importer may elect to have the merchandise classified as "privileged foreign status" or "nonprivileged foreign status" merchandise. 19 C.F.R. § 146.41 (1991) governs application for "privileged foreign status" and states in pertinent part:

> **§ 146.41 Privileged foreign status.**
>
> (a) *General.* Foreign merchandise which has not been manipulated or manufactured so as to effect a change in tariff classification will be given status as privileged foreign merchandise on proper application to the district director.

All other foreign merchandise brought into a FTZ is given "nonprivileged foreign status." *See* 19 C.F.R. § 146.42 (1991).

19 C.F.R. § 146.65(a) (1991) governs classification and valuation of foreign merchandise in a FTZ and states that privileged foreign merchandise "will be subject to tariff classification according to its character, condition and quantity, at the rate of duty and tax in force on the date of filing * * * [of] the application for privileged status" and that nonprivileged foreign merchandise "will be subject to tariff classification in accordance with its character, condition and quantity as constructively transferred to Customs territory at the time the entry or entry summary is filed with Customs."

[6] Torrington cites to 19 U.S.C. § 1673 (1988) which states:

> If–
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
> (2) the Commission determines that–
>
> (A) an industry in the United States–
>
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of *imports* of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for *importation*,
>
> then there shall be imposed upon such merchandise an antidumping duty * * *.

(Emphasis added).

The defendant and Koyo respond to Torrington's arguments by pointing out that the discussion of importation cited by Torrington as the focus of antidumping duty orders is contained at 19 U.S.C. § 1673 which refers specifically to less-than-fair-value and injury determinations and does not address the conduct of administrative reviews or the deposit of antidumping duties. *Defendant's Response* at 14–15; *Koyo's Memorandum* at 22; *Koyo's Reply* at 11–13.

The defendant, Koyo and NSK argue that 19 U.S.C. § 1675(a) (1988) governs the conduct of administrative reviews and requires the ITA to determine

> (A) the foreign market value and United States price of each *entry* of merchandise subject to the antidumping duty order and included within that determination, and
> (B) the amount, if any, by which the foreign market value of each such *entry* exceeds the United States price of the *entry*.

19 U.S.C. § 1675(a)(2) (emphasis added). The defendant, Koyo and NSK argue that the term entry is a term of art used in the Tariff Act of 1930, as amended, which includes the antidumping duty statute and various other customs laws, that the term "entry" in its broadest sense includes the transactions necessary to secure the release of merchandise from Customs' control and that this occurs when goods are transferred into the Customs territory of the U.S. *Defendant's Response* at 17–18; *Koyo's Memorandum* at 20–23; *Koyo's Reply* at 11–12; *NSK's Memorandum* at 21–22; *cf. Defendant-intervenor Caterpillar Inc.'s Memorandum of Points and Authorities in Support of the Motion of Koyo Seiko Co. Ltd. for Judgment on the Agency Record* ("*Caterpillar's Memorandum*") at 6–9; *see also Oxford Univ. Press, Inc. v. United States*, 29 Cust. Ct. 191, 196, C.D. 1467 (1952), *aff'd*, 33 Cust. Ct. 479, Abs. 58,636 (1954), *reh'g denied*, 34 Cust. Ct. 301, Abs. 58,807 (1955); 19 U.S.C. § 1484 (1988); 19 C.F.R. § 141.62 (1991).

Additionally, the defendant and defendant-intervenors Koyo, NTN, NSK and Caterpillar Inc. ("Caterpillar") argue that merchandise in a FTZ only becomes "subject to the laws and regulations of the United States affecting imported merchandise" when the merchandise "is [ ] sent from a zone into customs territory of the United States" and that the antidumping duty statute is clearly a "law[ ] * * * of the United States affecting imported merchandise." *Defendant's Response* at 18–19 (*citing* 19 U.S.C. § 81c(a)); *Koyo's Memorandum* at 20–22; *Koyo's Reply* at 10; *NTN's Reply* at 7; *NSK's Memorandum* at 19–21; *Caterpillar's Memorandum* at 5. Therefore, the ITA was correct in not requiring the posting of estimated antidumping duties upon importation of AFBs into FTZs.

In regard to Torrington's argument that the ITA should require importers to elect privileged status for their imports of AFBS into FTZs, the defendant, Koyo, NSK and Caterpillar argue that, at the time of the importation of the AFBs subject to this administrative review there was no statute or regulation which authorized the ITA to impose antidump-

ing duties on merchandise entered into the U.S. Customs territory which incorporated AFBs which, standing alone, would have been subject to antidumping duties. While the defendant admits that the new regulation found at 15 C.F.R. § 400.33(b) will require all future entries of merchandise subject to an antidumping or countervailing duty order to receive privileged status, the defendant, Koyo, NSK and Caterpillar point out that this regulation was not in effect at the time of the entries at issue here and indeed did not come into effect until nine months after the publication of the Final Results in this administrative review. *Defendant's Memorandum* at 24–27; *Koyo's Memorandum* at 23; *Koyo's Reply* at 14–15; *NSK's Memorandum* at 22–25; *Caterpillar's Memorandum* at 9–12.

Finally, the defendant argues that requiring AFB imports into FTZs to be classified as privileged foreign merchandise would not have changed the ITA's treatment of those AFBs which were incorporated into automobiles in a FTZ and then entered into the U.S. Customs territory. This is because the ITA has a long standing policy of deeming imports of merchandise containing products subject to an outstanding antidumping duty order, which covered parts comprise an insignificant amount by value of the finished article, as outside the scope of the antidumping duty order. *Defendant's Memorandum* at 20–27.[7]

In interpreting the Foreign Trade Zone statute Torrington has focused on the phrase "without being subject to the customs laws of the United States" arguing that the antidumping duty statute is not part of the U.S. customs laws. By doing so Torrington ignores the phrase "but when foreign merchandise is so sent from a zone into the customs territory of the United States it shall be subject to the laws and regulations affecting imported merchandise." 19 U.S.C. § 81c(a). This Court finds that it is unnecessary to determine whether the antidumping duty statute is or is not a part of the U.S. customs law because it is absolutely clear that the antidumping duty statue is a "law * * * affecting imported merchandise." *Id.* Therefore, this Court finds that the Foreign Trade Zone statute on its face exempts foreign merchandise within a FTZ from the imposition of antidumping duties until that merchandise is brought into the U.S. Customs territory, unless some other provision of the Foreign Trade Zone statute or the regulations promulgated pursuant to that law require otherwise.

At the time of the imports in question the only way that antidumping duties could be applied to foreign merchandise within a FTZ was if that merchandise was declared privileged pursuant to 19 C.F.R. § 146.41. While it is true that the FTZ Board has required such a declaration in

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[7] In the Final Results the ITA stated:

> The Department considers those AFBs otherwise subject to these orders that are incorporated into non-AFB products, which collectively comprise less than one percent of the value of the finished products sold to unrelated customers in the United States, to be outside the scope of the antidumping orders on AFBs and not subject to antidumping duty assessments.

Issues Appendix, 56 Fed. Reg. at 31,702.

granting applications for the creation or modification of a zone in the past, this Court finds no support for the contention that the ITA was *required* to request the FTZ board, or that the FTZ board was required on its own initiative, to impose such restrictions on all preexisting FTZs. Therefore, this Court finds that *at the time of the imports in question* there was no statute or regulation that required that antidumping duties be imposed on merchandise imported into a FTZ until such time as the merchandise enters the customs territory of the U.S.[8]

In addition, there is no reason to believe that the use of the term entry in the antidumping duty statute refers to anything other than formal entry of merchandise into the U.S. Customs territory. The antidumping duty statute is part of the Tariff Act of 1930, as amended, as are the regular customs laws of the U.S. which define entry as the process of filing documentation with Customs to allow Customs to determine whether the subject merchandise should be released from Customs' custody and, if so, what duties are due. 19 U.S.C. § 1484(a). This process occurs when merchandise formally enters the U.S. Customs territory. In the case of imports going through a FTZ, this occurs when the merchandise leaves the FTZ and enters the U.S. Customs territory.

Finally, 19 U.S.C. § 1673e(a)(3) (1988) "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise *at the same time* as estimated normal customs duties on that merchandise are deposited." (Emphasis added). In terms of merchandise inside a FTZ, the deposit of normal customs duties, and therefore the deposit of estimated antidumping duties, occurs when the merchandise is entered into the U.S. Customs territory unless the merchandise has been declared privileged. In this case this Court has already determined that there was no requirement that the imports in question be declared privileged, therefore deposits of estimated antidumping duties were due upon entry of the merchandise into the U.S. Customs territory.

4. *Re-exports:*

Torrington alleges that the ITA's failure to assess antidumping duties on AFBs imported by a related party in the United States and re-exported to a third country without a sale occurring in the United States was not in accordance with law. *Torrington's Response* at 66–68.

Specifically, Torrington argues that assessment of, and liability for the payment of, antidumping duties occurs upon importation, or at the latest, entry of the subject merchandise and is made on the basis of a comparison of the FMV and USP of each entry. Therefore, the relevant transaction for calculating the assessment of antidumping duties occurs upon importation or, at the latest, upon entry of the goods. *Torrington's Response* at 66–67.

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[8] The Court finds that the parties' discussion of 15 C.F.R. § 400.33(b) is irrelevant to deciding the issues raised in this case since this regulation did not take effect until well after importation of the merchandise in question occurred and in fact almost nine months after the administrative review at issue here was completed.

Torrington attempts to find support for its position by pointing out that Congress eliminated duty drawback with respect to antidumping duties paid on imported merchandise, incorporated into U.S. products and subsequently exported. 19 U.S.C. § 1677h (1988). Torrington also points out that the ITA agreed with and followed this position in *Tapered Roller Bearings Four Inches or Less in Outside diameter From Japan; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 22,369, 22,377 (1990). *Torrington's Response* at 67–68.

Torrington suggests that the ITA could overcome the lack of a USP due to the lack of a U.S. sale by using "best information available" based on adjusted resale price, other transaction margins, the margin from another time period, or the transfer price between the related parties. *Id.* at 68.

In the Final Results at issue here, the ITA rejected Torrington's argument by pointing out that in order for assessment of antidumping duties to take place, a sale must occur in the U.S. and that no U.S. sale has occurred in the case of the re-exported AFBs at issue here. *Issues Appendix*, 56 Fed. Reg. at 31,743; *Defendant's Memorandum* at 71–72; *see also Koyo's Memorandum* at 53–55; *Koyo's Reply* at 35–37; *NTN's Reply* at 26–29.

The defendant and NTN argue that antidumping duties are imposed "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise" yet here there is no USP. 19 U.S.C. § 1673; *see also* 19 U.S.C. § 1675(a); *Defendant's Memorandum* at 71; *NTN's Reply* at 26–27.

The defendant, Koyo and NTN point out that USP is defined as purchase price or exporter's sales price. 19 U.S.C. § 1677a(a). In the situation at issue here, where the only U.S. transaction is between related parties, purchase price can not apply because purchase price is the price agreed to between two unrelated parties prior to importation of the merchandise into the U.S. 19 U.S.C. § 1677a(b). Exporter's sales price also cannot be used because it is the price at which the merchandise is sold or agreed to be sold to an unrelated party in the U.S. 19 U.S.C. § 1677a(c). As a result, in this situation there is no USP to be compared to FMV and, therefore, antidumping duties cannot be assessed on AFBs re-exported by a related party without a U.S. sale. *Defendant's Memorandum* at 71–72; *Koyo's Reply* at 35–36; *NTN's Reply* at 26–27.

Further, the defendant and NTN argue that the purpose of the antidumping duty statute is to provide a remedy to U.S. industries which have been injured by reason of sales of foreign merchandise in the U.S. at less-than-fair-value. If there has been no sale in the U.S., then no U.S. industry has been injured by reason of the sale of the imports in question. *Defendant's Memorandum* at 74–75; *NTN's Reply* at 27–28.

Finally, the defendant and Koyo point out that an agency may change its prior practice if the agency determines that its earlier practice was in conflict with the statute citing *Citrosuco Paulista, S.A. v. United States,*

12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988). *Defendant's Memorandum* at 75; *Koyo's Reply* at 36–37.

This Court finds that there is no basis in the statute for the assessment of antidumping duties on imports to the U.S. of the subject merchandise by related parties which are subsequently reexported without a sale occurring in the U.S. The purpose and clear meaning of the language of the antidumping duty statute requires that there be some meaningful sale to, or in, the U.S. market which can be compared to FMV to derive the dumping margin. *See* 19 U.S.C. §§ 1673, 1675(a)(2), 1677a. No such sales have occurred here and no dumping margin can be calculated. Also, it is impossible to meet the statutory requirement that, in order to assess antidumping duties, a U.S. industry must be injured by imports if these imports are never sold in the U.S. market.

Therefore, this Court finds that the ITA's treatment of AFBs imported into the U.S. by related parties and subsequently reexported without sale in the U.S. was in accordance with law and is affirmed.

5. *Inventory Carrying Costs:*

In the Final Results of this administrative review the ITA correctly adjusted ESP for imputed inventory carrying costs pursuant to 19 U.S.C. § 1677a(e)(2) (1988). Torrington does not challenge this adjustment.

Pursuant to its new administrative practice, the ITA also made a corresponding adjustment to FMV for imputed inventory carrying costs when comparing ESP sales to FMV sales. The ITA explained its reasoning as follows:

> The Department adjusts for inventory carrying costs on U.S. sales through imputation because the actual financial cost, for the time between shipment from the parent and payment by the related importer, is generally borne by the foreign parent. Therefore, the cost will not be found on the books of the importer, but submerged in the accounts of the parent with other financial costs. As a result, some of the selling expenses associated with the U.S. sales are not directly identifiable. Similarly, in the home market, although the actual cost of carrying inventory is on the books of the seller, it will be commingled with all other interest expenses, and classified as a general and administrative expense rather than as a selling expense. As is the case for the U.S. sales, the actual amount is not identifiable. Therefore, it is appropriate to impute this cost in both markets, since the nature of the expense is the same, and the same difficulty exists in determining the actual costs in each market.

Issues Appendix, 56 Fed. Reg. at 31,727.

Torrington objects to this adjustment by the ITA to FMV for imputed inventory carrying costs. Torrington argues that the expense of carrying inventory in the home market "is a general and administrative expense, allocable to world-wide bearing sales and not identifiable as a 'difference' in circumstances of sale." *Torrington's Response* at 51. Torrington points out that adjustments to FMV pursuant to 19 U.S.C. § 1677b(a)(4)(B) are only allowed for price differences which result from

differences in circumstances of sale. Torrington argues that the costs of inventory administration were not listed in the statute, regulations or legislative history and are not differences in circumstances of sale for which an adjustment is allowed. *Id.* at 52–53.

Torrington argues that, to the extent that home market related party distributors incurred inventory carrying costs, the ITA would already have adjusted FMV for these expenses deeming them to be direct selling expenses. Therefore, any additional deduction from FMV for imputed inventory carrying costs could unjustifiably double-count the adjustment. *Id.* at 53–54.

Torrington also argues that the ITA's methodology for granting adjustments to FMV for imputed inventory carrying costs impermissibly grants such adjustments without requiring any substantiation by the respondents. *Id.* at 54 (*citing Timken Co. v. United States*, 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986)).

Finally, Torrington points out that the ITA's longstanding practice in regard to this issue was to deny an adjustment to FMV for imputed inventory carrying costs. *Torrington's Response* at 5152 (*citing Antidumping; Malleable Cast Iron Pipe Fittings, Other Than Grooved, From Brazil; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 10,897 (1986); *Final Determination of Sales at Less Than Fair Value; Certain Valves, Couplings, Nozzles and Connections of Brass, Suitable for Use in Interior Fire Protection Systems, From Italy*, 49 Fed. Reg. 47,066 (1984); *Kraft Condenser Paper From Finland; Final Results of Administrative Review of Antidumping Finding*, 47 Fed. Reg. 3,813 (1982)). Torrington also argues that this past practice by the ITA was specifically sanctioned by this court in *Daewoo*, 13 CIT at 274, 712 F. Supp. at 950. *Torrington's Response* at 54–55.

Defendant admits that the ITA has changed its administrative practice in regard to the treatment of home market pre-sale inventory costs. The defendant states that since 1987 the ITA has calculated inventory carrying costs from the date of production of merchandise destined for sale in both markets instead of the date of shipment. As a result, the ITA now believes that there are "pre-sale" inventory carrying costs in both markets which should be adjusted for in order to obtain an "apple with apple" comparison. *Defendant's Memorandum* at 60–62.

The ITA had always considered "post-sale" inventory carrying costs to be indirect selling expenses subject to adjustment via the ESP offset.[9] Since the ITA has determined that the correct point for comparing FMV and USP and for determining what costs can be adjusted for is at the point of production, it follows that all home market post-production inventory costs are now subject to the ESP offset. It is on this basis that the adjustment to FMV for imputed inventory carrying costs was made in this review. *Id.*; *cf. NSK's Memorandum* at 35–36.

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[9] *See supra* discussion of ESP offset at p. 11 and 19 C.F.R. § 353.56(b)(2) (1991).

Defendant argues that the *Daewoo* case is inapplicable to this case because the *Daewoo* court's decision was premised on the belief that there was no pre-sale inventory carrying expense in the home market which is comparable to the imputed inventory carrying expense for ESP sales. Defendant states that the ITA now believes that there are comparable inventory carrying costs in both markets which should be adjusted for. *Defendant's Memorandum* at 59–62.

Koyo and NSK argue that *Daewoo* is inapplicable to this case because the *Daewoo* court only found that the ITA is *not required* to make an adjustment to FMV for pre-sale inventory carrying costs, not that such an adjustment is not allowed. *Koyo's Reply* at 22–24; *NSK's Memorandum* at 37–38.

The defendant also argues that because these inventory carrying costs are carried on a company's books as general and administrative expenses does not mean that they are not indirect selling expenses subject to the ESP offset. *Defendant's Memorandum* at 63–64.

Koyo points out that it makes no sense for Torrington to suggest that inventory carrying costs in ESP transactions are selling expenses but that the same type of expenses in the home market are not. *Koyo's Reply* at 24.

Koyo also argues that the court in *Daewoo* sanctioned the ITA's methodology for imputing inventory carrying costs for ESP transactions and that the same method was used in this review. In addition, Koyo points out that Torrington presents no evidence that the ITA's imputation of expenses was incorrect. *Koyo's Reply* at 25–26 (*citing Daewoo,* 13 CIT at 274, 712 F. Supp. at 950).

Finally, the defendant and Koyo argue that Torrington has presented no evidence on the administrative record to show that double-counting of inventory carrying costs has occurred. *Defendant's Memorandum* at 64; *Koyo's Reply* at 24–25.

The ITA has a longstanding administrative practice, when comparing FMV and ESP sales, of adjusting FMV for indirect selling expenses subject to a cap in an amount equal to the adjustment for indirect selling expenses allowed for ESP sales. 19 C.F.R. § 353.56(b)(2). This so-called "ESP offset" was upheld by the U.S. Court of Appeals for the Federal Circuit in *Smith-Corona,* 713 F.2d at 1577–79.

This Court finds that pre-sale home market inventory carrying costs are indirect selling expenses which can be adjusted for subject to the ESP offset. 19 C.F.R. § 353.56(b)(2). It is clear, and Torrington does not dispute this finding, that inventory carrying costs related to ESP transactions are indirect selling expenses for which adjustment to ESP may be made pursuant to 19 U.S.C. § 1677a(e)(2). It is common sense that the same type of indirect selling expenses may occur in regard to home market sales *when* merchandise is held in inventory. The real question is how to measure the expense.

The antidumping duty statute requires that during an administrative review, the ITA determine the difference in price between a sale of the

subject merchandise in the home market to an unrelated party and a contemporaneous sale of the subject merchandise in the United States to an unrelated party. 19 U.S.C. §§ 1675(a)(2), 1677a, 1677b. The intent, and the ITA's practice, is to try to remove certain expenses to derive a FMV price and a USP price at a comparable point in the stream of commerce. 19 U.S.C. §§ 1677a(d)–(e), 1677b(a); *Smith-Corona,* 713 F.2d at 1571–72. This is to achieve the goal of having a so-called "apples with apples" price comparison.

When dealing with a specific expense such as inventory carrying costs, the key is for the ITA to determine the amount of the expense for each FMV and ESP sale by measuring the expense beginning at a common point in the stream of commerce at which point FMV merchandise and ESP merchandise have not yet been differentiated (i.e., in this case, the time of production of the merchandise) through the time of the sale of the merchandise to an unrelated party.

In this administrative review, the ITA followed its current administrative practice of measuring inventory carrying costs from the date of production. As long as the ITA is consistent in making its measurements in regard to FMV and ESP sales, this Court finds nothing wrong with this method of measuring such expenses.

In regard to the court's opinion in *Daewoo,* this Court finds that the situation facing the *Daewoo* court was substantially different from the situation presented here. In *Daewoo,* the ITA measured the amount of the adjustment for inventory carrying costs from the date of shipment of the goods to an unrelated buyer. In a home market sales situation, FMV would be adjusted only for any post-sale inventory carrying costs. Due to the ITA's choice of the point of reference for measuring inventory carrying costs, pre-sale inventory carrying costs were not subject to adjustment. The *Daewoo* court simply found that, given the ITA's point of reference for measuring such expenses, there was no requirement that the ITA make an adjustment to FMV for pre-sale inventory carrying costs. *Daewoo,* 13 CIT at 274, 712 F. Supp. at 950. In this case, the ITA has changed its point of reference and, in order to make a fair comparison, adjusts for all inventory carrying costs incurred for both FMV and ESP sales after production of the merchandise. Given its new point of reference for measuring inventory carrying costs, the ITA was correct to include home market inventory carrying costs incurred after the time of production of the merchandise as part of the pool of indirect selling expenses for which adjustment to FMV can be made subject to 19 C.F.R. § 353.56(b)(2) in those situations where AFBs produced for the home market were held in inventory.

Therefore, this Court finds that the ITA's adjustment to FMV for imputed inventory carrying costs pursuant to 19 C.F.R. § 353.56(b)(2) was a reasonable exercise of the ITA's discretion in implementing the antidumping duty statute and is affirmed.

Finally, Torrington has presented *no* evidence that double-counting of inventory carrying costs has occurred and, therefore, this Court de-

clines to reach this issue. *See Asociacion Colombiana de Exportadores v. United States,* 13 CIT 13, 19 n.8, 704 F. Supp. 1114, 1120 n.8 (1989), *aff'd on other grounds,* 901 F.2d 1084 (Fed. Cir. 1990), *cert. denied,* 111 S.Ct. 136 (1990).

6. *Post-sale Price Adjustments and Rebates:*

Torrington challenges the grant by the ITA to Koyo and NTN of an adjustment to FMV for post-sale price adjustments ("PSPAs") and rebates. *Torrington's Response* at 55–61.

In the Final Results of this administrative review, the ITA stated that in regard to PSPAs and rebates:

> The Department generally allows adjustments to home market price and USP for discounts and rebates where respondents have granted and paid them on sales of subject merchandise to unrelated parties during the period of review. Such discounts or rebates should be part of a respondent's standard business practice and not intended to avoid potential antidumping duty liability. The Department generally makes an adjustment if discounts and rebates, granted pursuant to accurately and adequately described programs, are properly reported on a sale or customer-specific basis and are directly associated with the products or sales under consideration.
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> * * * * * * *
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> Koyo: The adjustments claimed by Koyo are allowable because they are customary and an ordinary part of its business practices. Koyo determines these adjustments on a product-specific basis but aggregates them for bookkeeping purposes. Because they were allocated on neither a product-specific nor a customer-specific basis, we treated them as indirect selling expenses.
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> * * * * * * *
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> NTN: At verification, NTN demonstrated to the Department's satisfaction that its rebates were tied to sales of the subject merchandise, and that it granted rebates during the period of review for sales made during the period of review. Because it is the Department's practice to treat post-sale price adjustments as rebates where they are granted as a standard business practice, we have deducted the amount of the rebate from FMV.

Issues Appendix, 56 Fed. Reg. at 31,717–18.

Torrington argues that the ITA abdicated its responsibility by allowing the respondents to propose a methodology for calculating average price adjustments on a customer-specific basis, and allowing the respondents to do the actual calculations. *Torrington's Response* at 60–61 (*citing Timken,* 10 CIT at 98; 630 F. Supp. at 1338). Torrington also argues that Koyo and NTN incorrectly included PSPAs and rebates paid on non-scope merchandise in their calculations. *Torrington's Response* at 55–57. Torrington alleges that the administrative record shows that both Koyo and NTN had the necessary information to calculate product-specific PSPAs and rebates. *Id.* at 56–57. Finally, Torrington argues

that the ITA should not have granted adjustments for PSPAs and rebates as indirect selling expenses if the respondents had the necessary information to calculate these adjustments as direct price adjustments. *Id.* at 60–61.

Defendant argues that given the enormous number of sales transactions involved in this administrative review and the fact that the vast majority of them involved PSPAs or rebates, coupled with the fact that PSPAs and rebates were not always recorded on a product-specific basis, the methodology proposed by the respondents and accepted by the ITA to calculate an average PSPA or rebate per customer and apply that average to sales of the subject merchandise was reasonable. *Defendant's Memorandum* at 66–67; *cf. Koyo's Reply* at 28. Defendant points out that the calculation of the average adjustments per customer was based on actual aggregate PSPAs and rebates paid to each customer. *Defendant's Memorandum* at 67.

Defendant and Koyo argue that the ITA's use of a methodology which includes non-scope merchandise in calculating customer-specific PSPAs and rebates was approved by the U.S. Court of Appeals for the Federal Circuit in *Smith-Corona,* 713 F.2d at 1579–81. *Defendant's Memorandum* at 67; *Koyo's Reply* at 28–30. In addition, NTN points out that Torrington presents no evidence that the inclusion of non-scope merchandise in these calculations had any impact on the calculation of NTN's reported rebate percentage. *NTN's Reply* at 25.

The defendant, Koyo and NTN also point out that Koyo and NTN provided the ITA with detailed information on their claimed PSPAs and rebates and that the ITA verified this information for both respondents. *Defendant's Memorandum* at 67; *Koyo's Reply* at 30; *NTN's Reply* at 25.

Finally, the defendant points out that this Court has already upheld the ITA's grant of an indirect selling expense adjustment to Koyo's FMV for PSPAs and rebates in *Koyo Seiko Co. v. United States,* 16 CIT ___, ___, 796 F. Supp. 1526, 1529–30 (1992). *Defendant's Memorandum* at 68.

The Court begins by noting that the decision in *Koyo Seiko Co.,* 16 CIT at ___, 796 F. Supp. at 1529–30, only affirmed the ITA's decision to treat Koyo's PSPAs and rebates as indirect selling expenses and did not address the overall validity of the methodology used by the ITA in calculating adjustments to FMV for Koyo and NTN's PSPAs and rebates.

This administrative review entailed the calculation of dumping margins for a huge number of sales of AFBs, many of which involved PSPAs and rebates. In order to complete these reviews in a timely fashion, some use of sampling and averaging had to occur. The antidumping duty statute grants the ITA authority to use valid sampling and averaging techniques. 19 U.S.C. § 1677f–1 (1988). Nothing in the statute prevents the ITA from using averaging methodologies proposed by respondents as long as the ITA finds that the methods used "shall be representative of the transactions under investigation" and the data used is verified by the ITA as accurate. 19 U.S.C. §§ 1677e, 1677f–1(b) (1988). In this case,

the ITA verified the data used by Koyo and NTN to calculate claimed adjustments for PSPAs and rebates. Administrative Record Japan Public Documents ("AR Jap. Pub. Docs.") 659, 724.

However, this Court finds that the defendant and Koyo have misinterpreted the U.S. Court of Appeals for the Federal Circuit's decision in *Smith-Corona,* 713 F.2d at 1579–81. In *Smith-Corona,* the methodology approved by the court involved

> comput[ing] the ratio of the total sales amount of [in-scope merchandise] to the total sales amount of all merchandise subject to the rebate program. This ratio, multiplied by the total amount of rebate paid, yields the total amount of rebate paid for [in-scope merchandise] sales.

713 F.2d at 1579–80. Therefore, in *Smith-Corona,* rebates on out of scope merchandise were not included in the final calculation of the customer-specific PSPAs and rebates used in calculating actual dumping margins. *Id.*

Merchandise which is outside the scope of an antidumping duty order cannot be used in the calculation of antidumping duties. 19 U.S.C. § 1675(a)(2); *see Badger-Powhatan v. United States,* 10 CIT 241, 633 F. Supp. 1364, *appeal dismissed,* 808 F.2d 823 (Fed. Cir. 1986).

In this administrative review it is clear from the administrative record that PSPAs and rebates on sales of out of scope merchandise were used to calculate the adjustment to FMV for PSPAs and rebates. It is also clear that no effort was made to eliminate PSPAs and rebates paid on out of scope merchandise. This may have been accomplished by calculating the amount of in-scope merchandise sold to each customer as a percentage of total sales to that customer and applying this percentage to the total amount of PSPAs and rebates paid to that customer during the period of review to arrive at a total amount of PSPAs and rebates paid to that customer on sales of in scope merchandise within the period of review.

While, as discussed above, the ITA has a large amount of discretion in developing and accepting averaging and sampling techniques, this Court cannot allow the ITA to use a methodology which allows for the inclusion of PSPAs and rebates on out of scope merchandise in calculating adjustments to FMV and ultimately the dumping margins. Therefore, this Court remands this issue to the ITA to allow the ITA to develop a methodology which removes PSPAs and rebates paid on sales of out of scope merchandise from any adjustments made to FMV for PSPAs or rebates or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV.

7. *Koyo's Home Market Credit Costs:*

The final issue which Torrington raises in this proceeding is the ITA's acceptance of Koyo's proposed methodology for calculating and Koyo's calculation of home market credit costs.

For purposes of this administrative review, Koyo calculated customer-specific credit days outstanding for its fifty-three largest ball

bearing customers and thirty-two largest cylindrical roller bearing customers. This represented well over half of Koyo's home market sales of both types of bearings during the period of review. For its remaining customers, Koyo calculated a weight-averaged number of credit days outstanding using the information derived from its largest customers. AR Jap. Pub. Doc. 340.

In the Final Results of this administrative review, the ITA addressed this issue by stating:

> The Department prefers to have credit calculated on a transaction-by-transaction basis. However, given the massive number of transactions in these reviews, we consider calculations based on average credit days outstanding on a customer-specific basis to be reasonable. We verified that * * * Koyo based [its] home market credit amounts on a customer-specific average. This methodology takes into account different actual payment periods extended to different customers. * * *
>
> We also used Koyo['s] * * * credit costs, as reported, for these final results. Although credit expenses for * * * some of Koyo's sales were not calculated on a sale-specific or customer-specific basis, we have accepted the reported credit costs as the best information otherwise available in this review; however, with respect to the reporting of credit expense, this review is an exception to ordinary Department practice. In the future, in keeping with Department practice, credit expenses should be reported, at a minimum, on a customer-specific basis. In fact, the Department's preference remains sales-specific reporting of this expense.

Issues Appendix, 56 Fed. Reg. at 31,724.

Once again Torrington argues that the ITA abdicated its responsibility by allowing Koyo to propose a methodology for calculating credit costs and by allowing Koyo to do the actual calculations. *Torrington's Response* at 61–65 (*citing Timken,* 10 CIT at 98, 630 F. Supp. at 1338). Torrington alleges, and Koyo agrees, that Koyo's methodology was not random. *Torrington's Response* at 64; *Koyo's Memorandum* at 47. Therefore, Torrington argues that the methodology cannot be truly representative and should not have been accepted by the ITA. *Torrington's Response* at 64–65. Torrington also argues that even though the ITA verified Koyo's methodology and data, this does not prove that the results provided information representative of a transaction-by-transaction analysis and, therefore, should not have been accepted by the ITA. *Id.* at 65.

In support of its position, Torrington argues that in *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review* ("*Tapered Roller Bearings*"), 56 Fed. Reg. 26,054 (1991), the ITA rejected Koyo's proposed methodology for calculating credit costs as not representative. *Torrington's Response* at 64–65. In *Tapered Roller Bearings,* Koyo used a maximum and a minimum number of days outstanding per customer to calculate the average days out-

standing for each of its twenty largest customers. 56 Fed. Reg. at 26,058. The ITA rejected Koyo's approach as unrepresentative. *Id.* Torrington argues that the same logic applies to Koyo's proposed methodology in this administrative review. *Torrington's Response* at 65.

Defendant argues that

> it was clearly reasonable for Commerce to accept Koyo's credit calculations based upon the average credit days outstanding on a customer-specific basis, particularly when Commerce could verify that the home market credit amounts were customer-specific averages. As to those credit costs which were not calculated on a sale-specific or customer-specific basis, Commerce properly accepted them as best information available.

Defendant's Memorandum at 69.

Koyo argues that given the enormous number of sales used and high percentage of customers represented in its calculation of credit expenses, there is no basis for Torrington to allege that the data supplied by Koyo was skewed or unrepresentative. *Koyo's Reply* at 33. In addition, Koyo points out that the ITA verified the data provided by Koyo as accurate and then accepted Koyo's methodology as a representative sample of Koyo's home market credit costs. *Koyo's Reply* at 34.

Koyo also points out that the methodology rejected by the ITA in *Tapered Roller Bearings,* 56 Fed. Reg. at 26,058, differs in many important respects from the methodology used in this administrative review. Koyo states that in subsequent tapered roller bearing administrative reviews the ITA has accepted the same methodology as used in this review. *Koyo's Reply* at 33–34 (*citing Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,975, 4,982 (1992) and *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,960, 4,967–68 (1992)).

This Court finds that the methodology proposed by Koyo and accepted by the ITA to calculate Koyo's home market credit costs was reasonable given the circumstances of this case. Once again, it bears pointing out that the ITA was faced with calculating dumping margins for hundreds of thousands of sales transactions in this review within tight time limits. The use of various sampling and averaging techniques was required to meet these deadlines and the ITA has authority to do so pursuant to 19 U.S.C. § 1677f–1.

Simply because the ITA accepted a respondent's proposed methodology for calculating credit costs does not mean that the ITA has transferred control of the administrative review to the respondent. This conclusion is especially true in a situation where, as here, the ITA verified the underlying data upon which Koyo's credit costs were calculated. AR Jap. Pub. Doc. 659.

Therefore, this Court finds that the methodology used by the ITA in this review to calculate Koyo's home market credit costs may not be ab-

solutely perfect, or possibly the best method the ITA could have used, but it is a reasonable method which is well within the ITA's discretion to use pursuant to 19 U.S.C. § 1677f–1 and is, therefore, in accordance with law and supported by the administrative record.

Given that this Court has found that the ITA's use of home market credit costs calculated and submitted by Koyo on a customer-specific basis was in accordance with law and supported by evidence on the administrative record, this Court also finds that the ITA's decision to use this information as best information available in regard to home market credit costs not supplied on a customer-specific basis is also in accordance with law and supported by evidence on the administrative record. *See Chemical Prods. Corp. v. United States*, 10 CIT 626, 632–34, 645 F. Supp. 289, 294–96, *remand order vacated*, 10 CIT 819, 651 F. Supp. 1449 (1986) (ITA has broad discretion in its choice of best information available).

Conclusion

In accordance with the foregoing opinion, this case is remanded to the ITA to add the full amount of VAT paid on each sale in the home market to FMV without adjustment and to develop a methodology which removes PSPAs and rebates paid on sales of out of scope merchandise from any adjustment made to FMV for PSPAs and rebates, or to deny an adjustment if a viable method cannot be found. ITA's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 93–45)

ENRON OIL TRADING & TRANSPORTATION CO., F.K.A. UPG FALCO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–09–00935

Opinion

(Dated March 29, 1993)

Law Offices of Hebert Peter Larsen (*Herbert Peter Larsen* and *Debra Weiss*) for plaintiff.
Stuart E. Schiffer, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, international Trade Field Office, Commercial Litigation Branch, United States Department of Justice, (*Mark S. Sochaczewsky*) for defendant.

Findings of Fact and Conclusions of Law

MUSGRAVE, *Judge:* The parties to this action having submitted the same for decision and judgment after trial in San Francisco, California

on January 28, 1993, and this Court having given due consideration to the testimony of five witnesses for plaintiff and two witnesses for defendant, together with due consideration of the uncontested facts, claims and defenses, and exhibits attached to the pre-trial order herein, this Court now enters judgment for plaintiff on the basis of the Findings of Fact and Conclusions of Law set forth below.

FINDINGS OF FACTS

1. Enron Oil Trading & Transportation Company is the successor in interest to UPG Falco, Inc., the importer of record of the present shipment and of six (6) other shipments of merchandise which it claims to be similar in all material effects and which are the subject of two (2) other cases before this Court.

2. The merchandise in issue in the instant action consists of 272,209 Bbls. (11,432,794 gals.) of Romanian petroleum blendstock exported from its country of origin on December 13, 1985 directly to the United States aboard the vessel *MT Orchid B.*

3. The merchandise was entered at the District of San Francisco, California, by means of Consumption Entry No. 86–122596–9 on January 18, 1986, under Item 475.65, Tariff Schedules of the United States ("TSUS"), as "Mixtures of hydrocarbons n.s.p.f., derived wholly from petroleum, shale oil, natural gas, or combinations thereof, which contain by weight not over 50 percent of any single hydrocarbon compound: In liquid form * * *." at the duty rate of 0.25 cents per gallon.

4. The Customs Service, upon liquidation, reclassified the merchandise under Item 475.25, TSUS, as "Motor fuel" at the duty rate of 1.25 cents per gallon.

5. Plaintiff protested the liquidation on grounds that the merchandise was erroneously classified, asserting by protest and pleadings that the correct classification of the merchandise is under Item A407.19, TSUS, as a benzenoid mixture eligible for duty-free treatment.

6. The merchandise at issue was sold by Petrolexport Import of Romania for exportation to the United States to Mabanaft A.G. under a through bill of lading and was resold en route to UPG Falco, Inc., without entering the commerce of any other country at any time subsequent to its exportation from Romanina.

7. The merchandise at issue was reported upon entry as the product of Romania and that report was accepted by the Customs Service; wherefore, country of origin was not contested in this civil action.

8. Romania was a designed Beneficiary Developing Country pursuant to the Generalized System of Preferences authorized by Title V of the Trade Act of 1974, Pub. L. 93618, 88 Stat. 2066, at all pertinent times.

9. The parties agreed before trial that, should the Court reject defendant's classification of the imported merchandise as "Motor fuel," the merchandise should be classified under Item A407.19, TSUS, and accorded duty-free treatment under the Generalized System of Preferences. After trial, the Court pointed out to the parties that Item A407.19 TSUS did not exist in 1986. The parties have since agreed that Item

A407.16 TSUS (1986) is the appropriate classification, should the Court reject the defendant's classification as "Motor fuel."

10. The merchandise was classified as "Motor fuel" pursuant to Treasury Decision 83173 and San Francisco Customs Service Laboratory Report No. 8–86–10891–001, which recited: "This clear Yellow liquid petroleum sample meets our key subset of the ASTM D–439 specification for gasoline motor fuel. This sample has an octane index of 85.4."

11. ASTM D–439, entitled "Standard Specification for Automotive Gasoline" and referenced in Treasury Decision 83–173, does not recite or refer to any "key subset" of its provisions, but sets forth requirements for five (5) "Volatility Classes" of the product.

12. The Customs Service has not produced or published any "key subset" of ASTM D–439 provisions.

13. ASTM D–439 sets forth minimum requirements for what may be considered Automotive Gasoline; contacts for delivery of finished "Automotive Gasoline" in the United States usually incorporate its provisions but often specify additional requirements which may be more stringent.

14. Table I of ASTM D–439 recites pertinent specifications for each "Volatility Class" of finished Automotive Gasoline, each specification to be determined in accordance with test methods set forth in Section 8 of the standard.

15. The aforementioned test methods include the following ten (10) characteristics of product:

a. Distillation.
b. Vapor-Liquid Ratio.
c. Vapor Pressure.
d. Research Method Octane Number.
e. Motor Method Octane Number.
f. Corrosion.
g. Existent Gum.
h. Sulfur.
i. Lead.
j. Oxidation Stability.

16. The Customs Service Laboratory did not itself perform any of the prescribed ASTM procedures to completion.

17. The Customs Service Laboratory performed a distillation pursuant to the prescribed standard ASTM D–86, but did not complete the process.

18. The Customs Service Laboratory performed a test for the presence of lead by a method different from any of six (6) test methods authorized and prescribed by ASTM D–439.

19. The Customs Service did not attempt to perform the prescribed test methods for the following six characteristics specified in ASTM D–439:

a. Vapor-Liquid Ratio.
b. Vapor Pressure.
c. Corrosion.
d. Existent Gum.
e. Sulfur.
f. Oxidation Stability.

20. The Customs Service Laboratory directed a sample of the merchandise taken directly from the vessel to the Sacramento Laboratory of the Division of Measurement Standards of the Department of Food and Agriculture of the State of California for the purpose of determining Research Octane Number ("RON") and Motor Octane Number ("MON").

21. The Sacramento Laboratory reported RON as 90.9 and MON as 80.0, but the Director of the Laboratory was unable to certify that the respective procedures (ASTM D–2699 and ASTM D–2700) were performed completely, because the pertinent backup records were dispose of 2 years after the tests were conducted, in accordance with the laboratory's standard procedures.

22. Plaintiff directed a sample of the merchandise taken after offloading into a shore tank to Core Laboratories in Long Beach, California for testing with respect to RON and MON, as well as sulfur content. The shore tank contained a small amount of another petroleum product, to which the imported merchandise was added. Plaintiff's witness Mitchell stated that he noticed no effect due to the material in the shore tank, and that if it was "at all close to" unleaded regular gasoline the effect would have been negligible. This testimony was unrebutted.

23. The Long Beach Laboratory reported RON as 89.2 and MON as 80.2, and certified that the respective procedures (as above) were performed twice on the sample under reproducibility conditions of two operators and two sets of apparatus and that the results were found to agree within the more exacting standards of repeatability which normally apply to tests performed twice by the same operator on the same apparatus.

24. The average of RON and MON, referred to as (R+M)/2 or as Antiknock Index ("AKI") was calculated at Sacramento to be 85.4 and at Long Beach to be 84.7.

25. If the Customs Service had been shown and had accepted the Long Beach report and were the Sacramento report absent, the merchandise would not have been classified as "Motor fuel," since the Customs Service uses an AKI demarcation point of 85.0 in determining tariff classification.

26. Automotive gasoline having an AKI of lower than 87 was sold at the pertinent time only in the Rocky Mountain states.

27. There are substantial differences between the measured distillation characteristics of the merchandise and those reported in definitive

survey tests run upon samples of finished 85 AKI gasoline sold in Rocky Mountain test areas during the same period by the Motor Vehicle Manufacturers Association.

28. Production and distribution of 85 AKI gasoline is largely localized in the Rocky Mountain states.

29. No witness had knowledge of any instance of imported Romanian blendstock being used without further blending as automotive fuel.

30. The actual use of the merchandise was as blendstock, and not as motor fuel; the Romanian blendstock was admixed with both premium and regular grades of Exxon unleaded gasoline before sale for consumption.

31. Many blendstocks which are not finished gasolines are produced in the United States which would have measured RON and MON at levels which would compute to AKI numbers higher than 85.

32. One such blendstock is produced by use of Fluid Catalytic Crackers and is called FCC gasoline or FCC stock; it is made at American refineries in quantities exceeding domestic production of finished 85 AKI gasoline by a factor of twenty (20) to one (1).

33. FCC stock typically possess AKI numbers ranging from 85 to 87, but is not suitable for use as motor fuel by itself; it must be blended with other refinery products in order to formulate a finished gasoline.

34. The chief use of petroleum hydrocarbon mixtures having an AKI of between 85 and 87 at the relevant time was as blendstock.

35. No witness would tolerate use of the merchandise in his personal vehicle or recommended such use.

36. Defendant's two witnesses stated that, based upon the totality of laboratory results, including a gas chromatogram of the imported merchandise, it was their opinion that the merchandise was classifiable as motor fuel, for tariff purposes. Both witnesses stated that they would not want to use the merchandise as imported in an automobile.

Conclusions of Law

1. The merchandise does not belong to a class or kind of product chiefly used in the United States during the pertinent period as fuel for internal combustion or other engines.

2. The merchandise, Romanian petroleum blendstock, is not chiefly used in its imported condition as fuel for internal combustion or other engines.

3. The merchandise was actually used, and belongs to a class or kind of product chiefly used as a blendstock.

4. The presumption of correctness inherent in the tariff classification assigned to the merchandise by the appropriate customs officer has been overcome by the preponderance of credible evidence, including the admission by a Government witness that the Customs Service did not perform all of the tests for the relevant characteristics of the product that are prescribed by the ASTM standard which the Customs Service has adopted.

5. The subject entry should be reliquidated and the merchandise reclassified as mixtures in whole or in part of synthetic organic benzenoid compounds free of duty under item A407.16, TSUS (1986), and refund of all duties paid, with interest, should be made.

Judgment will be entered in conformity with the foregoing findings and conclusions.

(Slip Op. 93–46)

GROUP ITALGLASS U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–09–00677

(Dated March 29, 1993)

[Plaintiff's motion for summary judgment denied; plaintiff granted partial summary judgment on classification of one item of merchandise.]

On the Motion:

Soller, Shayne & Horn (*Paulsen K. Vandevert, William C. Shayne,* and *Margaret H. Sachter,* Esqs.) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Mark S. Sochaczewsky,* Esq.), Commercial Litigation Office, Civil Division, Department of Justice; *Stephen Berke,* Esq., United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION AND ORDER

NEWMAN, *Senior Judge:* These three consolidated actions (91–09–00677, 91–10–00745, and 91–08–00594) contesting the classification upon liquidation of the entries by the United States Customs Service ("Customs") of certain glass jars and other glassware imported by plaintiff are before me for *de novo* review pursuant to the court's jurisdiction under 28 U.S.C. § 1581(a). *See also* 28 U.S.C. § 2640(a)(1). Plaintiff has submitted samples, documentary evidence, and supplemental memoranda of law in support its previous motions for summary judgment pursuant to CIT Rule 56, which motions were denied on August 25, 1992. *Group Italglass U.S.A., Inc. v. United States,* 798 F. Supp. 727, 798 F. Supp. 729, and 798 F. Supp. 731 (CIT 1992). Defendant has also supplemented its previous filings in opposition on the ground that there remain genuine issues of material fact to be tried.

Briefly, these proceedings are the sequela of *Group Italglass U.S.A., Inc. v. United States,* 807 F. Supp. 124 (CIT 1992), wherein plaintiff's application for a rehearing and reconsideration of the denial of its motions for summary judgment was granted on October 21, 1992. Familiarity by the reader with the prior opinions is assumed.

The subject glassware was classified by Customs under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading

7013.39.20 and assessed with duty at the rate of 30 percent *ad valorem*, as glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than those of heading 7010 or heading 7018). Plaintiff claims that the imported articles should have been classified under the provision in heading 7010, HTSUS, for jars and other containers of glass, of a kind used for the conveyance or packing of goods, and accordingly are duty free.

Although by statute Customs' classification under subheading 7013.39.20 must be deemed as presumptively correct (28 U.S.C. § 2639(a)(1)), if merchandise is indeed properly classifiable under heading 7010, as claimed by plaintiff, the provisions of that heading explicitly preempt those in heading 7013.39.20. Stated otherwise, plaintiff automatically overcomes the presumption of correctness attaching to Customs' classification under heading 7013.39.20 simply by establishing that its glassware is classifiable under heading 7010.

In the initial decisions of August 25 1992, plaintiff's motions for summary judgment were denied for the reasons that plaintiff had failed to adduce evidence sufficiently identifying the various glass jars, bottles, canisters, etc., in the invoices covered by the particular entries in the case, and had also failed to submit any evidence concerning the issues of secure closures and use of the containers. The decision of October 21, 1992, *supra*, permitted plaintiff to pursue further discovery and both parties to submit additional proofs and supplemental briefing on the motion for summary judgment.

Defendant now concedes that identification of the subject merchandise under the entries and commercial invoices can be determined with reference to the verbal descriptions, style numbers, and photographs in plaintiff's catalog. Accordingly, there remains no genuine issue relative to the identification of the merchandise covered by these proceedings.

We now turn to the classification issue. Defendant concedes that one of the items of glassware in dispute, style No. 016–4923 covered by Court No. 91–10–00745 and classified by Customs under subheading 7013.39.20, is properly classifiable under heading 7010. Accordingly, partial summary judgment is appropriate for plaintiff in Court No. 91–10–00745 regarding article 016–4923. The proper classification of the balance of the merchandise, however, remains in dispute.

Fundamentally, on a motion for summary judgment plaintiff has the burden of establishing the same essential elements of its case that it would be required to prove at trial, and in addition must also demonstrate that there is no genuine issue as to any material fact. *Allied International v. United States*, 795 F. Supp. 449 (CIT 1992). Plaintiff's position is that summary judgment should be entered for classification under heading 7010 because there is no issue of fact that the subject merchandise comprises glass containers with secure closures that are *suitable for use* in the conveyance or packing of goods, and therefore as a matter of law are classifiable under heading 7010. Defendant, on the other hand, argues that there is a genuine issue of material fact as to

whether the merchandise was *principally used commercially* for the conveyance or packing of goods, which principal use is viewed by defendant as a prerequisite for classification under the provision of heading 7010 relied on by plaintiff.

I agree with defendant's contention. The language in heading 7010 "of a kind used for" explicitly invokes use as a criterion for classification and under heading 7010 principal use is controlling. *See* HTSUS Additional U.S. Rules of Interpretation, 1.(a). This relevant interpretative rule reads:

> 1. In the absence of special language or context which otherwise requires–
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of *goods of that class or kind* to which the imported goods belong, and *the controlling use is the principal use.* [Emphasis added.]

Plaintiff contends that the phrase "of the kind" preceding the words "used for" in heading 7010 is "special language or context which otherwise requires" within the purview of the foregoing interpretative rule, and therefore principal use is not controlling under heading 7010. I do not agree. The language in heading 7010 "of the kind" preceding "used for" simply buttresses the interpretative rule for use provisions that it is the use of the *class or kind* of goods imported that is controlling rather than the use to which the specific imports were put. A similar "class or kind" of merchandise concept was employed in the General Headnotes and Rules of Interpretation for the Tariff Schedules of the United States, rule 10(e)(i), except that the TSUS test was "chief use" of the articles of the class or kind to which the imported articles belong rather than "principal use."

Citing the *Harmonized Commodity Description and Coding System Explanatory Notes* of the Customs Cooperation Council, Section XIII, heading 70.10, defendant also urges that HTSUS heading 7010 is intended to cover glass containers commonly used commercially for the conveyance or packing of goods. Plaintiff urges the court to disregard the *Explanatory Notes* since they cannot be used to override the clear intent of Congress or the clear language of the statute.

While admittedly not dispositive of the interpretation of HTSUS provisions, the Customs Cooperation Council's interpretation under heading 70.10 is consistent with the intended scope of heading 7010 as indicated by the specific exemplar containers, and therefore the court sees no compelling reason why the Council's useful guidance as to the intended scope of the provision should be discounted or disregarded. *Cf. Ugg International, Inc. v. United States,* ____ CIT ____, Slip Op. 93–16 (Feb. 4, 1993); *Pfaff Am. Sales Corp. v. United States,* ____ CIT ____, Slip Op. 92–226 (Dec. 18, 1992); *Regaliti, Inc. v. United States,* ____ CIT ____, Slip Op. 92–80 (May 21, 1992). Hence, I agree with defendant that

the provision claimed by plaintiff requires proof that the containers were *principally* used in the *commercial* conveyance and packing of goods.

The record before the court in support of plaintiff's motion includes, *inter alia,* an affidavit of Donald R. Sanders, plaintiff's president. The Sanders affidavit states that plaintiff is a supplier of various glass containers to food packers and processors that use plaintiff's containers to pack their food products for sales at wholesale to retailers who then sell the packed containers to consumers; and further that plaintiff also sells its containers directly to retailers who both use them for packing their own food products sold to consumers, and who resell the containers unpacked and empty to consumers to be used as storage containers.

More, Sanders alleges that the glass containers in this case are, and are designed to be, closed by a secure closure, *i.e.,* closures such as a metal bail, cork stopper or glass stopper with plastic ring, and screw top, that function to protect the containers' contents from damage, spillage, and deterioration. Continuing, the Sanders affidavit identifies samples of the containers at issue in this motion for summary judgment arranged according to the type of closure, *i.e.,* bail top, cork or glass/plastic stopper, and screw-on or snap-on top. According to Sanders, plaintiff's containers, whatever their size, shape or color, serve primarily to keep their contents intact and fresh.

Relative to secure closures, defendant states in its Modified Response to Plaintiff's Statement of Material Facts Not In issue, par. 7, simply "that as part of this design [for storage of liquid or solid products], the articles have closures that are secure to a certain extent," and "denies that the closures are secure for all purposes." Aside from the question of whether defendant's Modified Rule 56(i) Statement, par. 7, even controverts plaintiff's Rule 56(i) Statement, pars. 7 and 8, regarding secure closures, defendant submitted no *contravening evidence* whatever on the issue of secure closures disputing Sander's statement. Consequently, there is no genuine factual dispute on the issue of secure closures insofar as they function to protect the containers' contents from damage, spillage, and deterioration. Defendant's responses to plaintiff's interrogatories state (on information and belief) that the subject jars are used for the storage of food and other goods and some (*i.e.*. Fido type jars) may be used by retailers for packing their merchandise for sale to the ultimate consumer. However, according to defendant's interrogatory responses, when used as packaging for food or other goods, the ultimate consumers of the jars at issue retain them for reuse as storage jars. By contrast, according to defendant's interrogatory responses, glass containers intended for the packing and conveyance of goods like standard jam and jelly jars, toiletry bottles, beer bottles, phials, juice jars and ampules, usually are not reused by the ultimate consumer but rather are discarded.

Defendant's interrogatory responses further indicate that unlike ordinary glass containers used solely for conveyance and packing of goods

and then discarded by the ultimate consumer, the subject merchandise represents substantial glass articles that look like mason jars and would be attractive to the ultimate consumer for reuse as household storage containers. Finally, defendant avers in response to plaintiff's interrogatories that the subject articles are sold for storage purposes to the general consumer even where they are sold packed with merchandise.

Defendant submitted in opposition to plaintiff's motion an affidavit by Nicholas Malfi, an import specialist for Customs at the New York Seaport Area, with attached catalog pages of Knobler International, Ltd. (Summer 1991) and Himark Enterprises, Inc. Mr. Malfi states that articles of the type described in the Sanders affidavit and represented by the glass articles and descriptive material before the court, regardless of size, shape, color or closure, "have been shown to be" storage articles for sale in an empty condition to the ultimate purchaser. Malfi bases his personal knowledge of the foregoing facts on his visits to retailers such as Lechter's Housewares and Gifts, Bloomingdales, Century 21 Department Store, and Dean and Deluca. The Malfi affidavit does not controvert Sander's description of the articles as "containers" or that the articles are in fact used for packing of food products. Malfi denies simply that evidence of such use was ever submitted to him.

Defendant maintains that, except for article 016–4923 covered by Court No. 91–10–00745, there are genuine issues of material fact bearing on whether the class or kind of glass articles are principally used commercially for the conveyance or packing of goods and therefore, plaintiff's motion for summary judgment must be denied.

In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is fundamental that in order to prevail on a motion for summary judgment, there must be no genuine issue of material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 (1970); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F. 2d 1560, 1562–64 (Fed. Cir. 1987); *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1163 (Fed. Cir. 1985): *D. L. Auld Co. v. Chroma Graphics Corp.*, 714 F. 2d 1144, 1146 (Fed. Cir. 1983).

The evidentiary materials submitted by the parties indicate that the subject merchandise, whether jars, bottles or canisters, etc., comprise "containers" used both for commercial packing of food and are sold empty to ultimate consumers that use the articles for storage. Except for article 016–4923 covered by Court No. 91–10–00745 —concededly classifiable under heading 7010—there is a genuine issue of material fact for trial revolving around whether the merchandise was *principally* used *commercially* for the conveyance or packing of goods.

The foregoing is a critical issue of fact to sustain plaintiff's claim for classification of the merchandise under heading 7010–on which issue plaintiff bears the burden of proof and defendant enjoys the statutory

presumption of correctness of classification under heading 7013.39.20 with the coincident presumption that the merchandise does not meet the requirements for classification under heading 7010. Plaintiff's argument at length that defendant has the burden of affirmatively establishing the correctness of its classification under heading 7013.39.20 by showing the inapplicability of heading 7010 is without merit. Clearly, plaintiff has the burden of establishing that the government's classification is wrong. *Jarvis Clark Co. v. United States,* 733 F. 2d 873 (Fed. Cir. 1984).

For the foregoing reasons, plaintiff's motion for summary judgment is denied, except that partial summary judgment is entered for plaintiff respecting article 016–4923 covered by Court No. 91–10–00745. Relative to the other merchandise at issue, defendant's request that it be granted summary judgment by treating its opposition as a cross-motion is denied. *St. Regis Paper Co. v. United States,* 6 CIT 213 (1983).

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's unpublished order entered on March 30, 1993 is being published by the Clerk's Office as Slip. Op. 93–47 on March 30, 1993.

(Slip Op. 93–47)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 90–10–00543

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP OF U.S.A., INC., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 90–10–00548

(Dated March 30, 1993)

ORDER

TSOUCALAS, *Judge:* Upon consideration of the Motion for Second Remand and Memorandum in Support thereof filed by NSK Ltd. and NSK Corporation (collectively "NSK"), and upon consideration of all other papers and proceedings herein, it is hereby

ORDERED that the motion for remand is granted, and it is further

ORDERED this action is remanded to the Department of Commerce, International Trade Administration ("Commerce") for the purpose of recalculating NSK's dumping margin. Specifically, where Commerce used the rate of 52.17 percent as best information available for certain NSK sales, Commerce shall substitute the rate which it determines applica-

ble to Koyo Seiko Co., Ltd. pursuant to this court's remand order of January 8, 1993 in *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., Inc. v. United States,* Court No. 90–10–00546, Slip Op. 93–3, ("*Koyo Seiko*"). It is further

ORDERED that the remand results are due at the same time the remand results in *Koyo Seiko* are filed. Any comments or responses by the parties are due within fifteen (15) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 93–48)

COMMITTEE OF DOMESTIC STEEL WIRE ROPE AND SPECIALTY CABLE MANUFACTURERS, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ACINDAR INDUSTRIA ARGENTINA DE ACEROS, S.A., WIRE ROPE IMPORTERS' ASSOCIATION OF AMERICA, ET AL., GRUPO INDUSTRIAL CAMESA, S.A. DE C.V., COMMERCIAL CAMESA, S.A. DE C.V., ACEROS CAMESA, S.A. DE C.V., CAMESA INC., AND CHINA NATIONAL METALS AND MINERALS IMPORT AND EXPORT CORP., DEFENDANT-INTEVENORS

Consolidated Court No. 91–09–00685

Plaintiff moves for judgment on the agency record claiming that the determination of the United States International Trade Commission ("ITC"), which held that the domestic steel wire rope industry is not suffering material injury or threatened with material injury from imported merchandise, was unsupported by substantial evidence on the record. Furthermore, plaintiff claims that the ITC failed to adhere to established judicial and administrative precepts in determining that the subject imports were not a cause of material injury to the domestic industry.

Held: Plaintiff's motion is denied as the ITC's conclusion, that the domestic steel wire rope industry was not injured or threatened with material injury, was reasonable and in accordance with law. Therefore, its determination is affirmed in all respects and this case is dismissed.

[Plaintiff's motion denied; case dismissed.]

(Dated March 30, 1993)

Harris & Ellsworth (*Herbert E. Harris II, Cheryl Ellsworth* and *Jeffrey S. Levin*) for plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel, and *Lyle B. Vander Schaaf,* Office of the General Counsel, U.S. International Trade Commission, for defendant.

Baker & McKenzie (*Thomas Peele* and *Steven F. Fabry*) for defendant-intervenor Acindar Industria Argentina de Aceros, S.A.

Klayman & Associates, P.C. (*Larry Klayman*) for defendant-intervenor Wire Rope Importers' Association of America, et al.

Shearman & Sterling (*Thomas B. Wilner, Jeffrey M. Winton* and *Patrick Meagher*) for defendant-intervenor Grupo Industrial Camesa, S.A. de C.V., et al.

Graham & James (*Lawrence R. Walders, Samuel X. Zhang, Jeffrey L. Snyder* and *Matthew E. Marquis*) for defendant-intervenor China National Metals and Minerals Import and Export Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers ("The Committee"), move for judgment on the agency record challenging the final negative determinations of the United States International Trade Commission ("ITC") in *Steel Wire Rope From Argentina and Mexico,* 56 Fed. Reg. 41,565 (1991), and *Steel Wire Rope From India, the People's Republic of China, Taiwan and Thailand,* 56 Fed. Reg. 56,662 (1991).

On November 5, 1990, plaintiff filed a petition with the ITC and the United States Department of Commerce, alleging that imports of steel wire rope from Argentina, Chile, India, Israel, Mexico, the People's Republic of China, Taiwan and Thailand were being sold in the United States at less than fair value (LTFV). *See Steel Wire Rope From India, the People's Republic of China, Taiwan, and Thailand* ("*Steel Wire Rope I*"), U.S.I.T.C. Public 2442, Inv. Nos. 701–TA–305 and 731–TA–478, 480–482 at 4, n. 6 (1991).

Plaintiff further alleged that the domestic industry was materially injured or threatened with material injury by reason of these imports.

In its final determination, the ITC unanimously determined that the domestic industry is not materially injured or threatened with material injury by reason of imports of steel wire rope from the People's Republic of China ("China"), Taiwan, and Thailand that are sold at LTFV and imports from India that are both subsidized and sold at LTFV. *Steel Wire Rope I* at 3. Likewise, the ITC determined that the domestic industry is not materially injured or threatened with material injury by reason of imports of steel wire rope from Argentina and Mexico. *Steel Wire Rope From Argentina and Mexico* ("*Steel Wire Rope II*"), U.S.I.T.C. Public. 2410, Inv. Nos. 731–TA–476 and 479 at 3 (1991).

Plaintiff now claims that these determinations were unsupported by substantial evidence on the record. Specifically, plaintiff claims that certain sales should not have been included in the domestic industry's total sales figures and furthermore that the ITC miscalculated the "cost of goods sold" for these sales. Plaintiff also claims that the ITC's inclusion of stainless steel wire rope within the "like product" definition was unsupported by substantial evidence on the record. Plaintiff further claims that the ITC failed to adhere to established judicial and administrative precepts in determining that the subject imports were not a cause of material injury to the domestic industry.

DISCUSSION

In reviewing a final determination of the ITC, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988 & Supp. 1992). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951)

(quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *The Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Material Injury:*

In order to make a final affirmative determination in its injury investigation, the ITC must find that an industry in the United States: "(i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise * * *." *See* 19 U.S.C. § 1673d(b)(1)(1988).

The law sets forth several guidelines for the ITC to consider in analyzing the issue of material injury. Among the relevant factors for the ITC to consider are: (1) the volume of imports, (2) the effect of imports of that merchandise on prices in the United States for like products, and (3) the impact of such merchandise on domestic producers of like products. *See* 19 U.S.C. § 1677(7)(B)(1988).

In its final determination, which concluded that the domestic steel wire rope industry is not experiencing material injury and is not threatened with material injury, the ITC stated that:

> Net sales, gross profits, and operating income levels all increased steadily from 1988 to 1990. During this investigation period, net sales increased from $225 million to $239 million, and gross profits rose from $52.7 million to 63.4 million. This trend was also reflected in operating income, which increased markedly from $6.4 million in 1988 to $11.1 million in 1990.

Steel Wire Rope II at 14.

Plaintiff claims that the ITC's conclusions are based on "fundamentally inaccurate data." *See Memorandum in Support of Plaintiff's Motion For Judgment Upon the Agency Record* ("*Plaintiff's Brief*") at 16. During the investigatory period, two major U.S. wire rope producers ceased operation and subsequently sold many of their assets to surviving producers. First, in April 1988, assets of Union Wire Rope, a division of Armco Inc., were purchased by Wire Rope Corporation of America, Inc. ("WRCA"). Second, in June 1989, the assets of Bethlehem Steel Wire Rope Division were purchased by Williamsport Wirerope Works, Inc. ("Williamsport"). Among the assets purchased in these sales were finished goods inventory. *Plaintiff's Brief* at 16–17.

In determining whether the domestic steel wire industry was injured, the ITC included the buyer's sales of the acquired inventory in its analysis of the total net sales of WRCA and Williamsport. *Steel Wire Rope II* at 14, n.41. The ITC stated that they included the sales of the inventory in the net sales figure "because the original transfers of the goods were not reported as sales by the firms that were purchased, the amounts are

substantial, and the inventory was valued as fair market value by independent auditors." *Id.*

Plaintiff disagrees and claims that this constituted error on the part of the ITC which was compounded by its allegedly inaccurate "cost of goods sold" calculations. Rather than attributing the actual cost of producing the acquired inventory, the ITC used as "cost of goods sold" the nominal purchase price that the respective companies paid for the inventory. *See Plaintiff's Brief* at 17–18.

Plaintiff's contention that these sales should not have been included in the total net sales of WRCA and Williamsport is erroneous because they represent sales made by the domestic industry. However, plaintiff's argument that the ITC erroneously calculated "cost of goods sold" has merit. If the companies purchased the inventory at a nominal price far below the actual cost of goods sold, then this could artificially inflate the profits of the industry. Based on the evidence on the record, however, any marginal error on the part of the ITC would not have made a difference in their determination. The ITC determined during its investigation that sales increased, as did gross profits and operating income. Therefore, the ITC acted reasonably in determining that there was no injury caused to the domestic industry.

2. *Causal Link Between Imports and Industry:*

Plaintiff also claims the ITC failed to adhere to established judicial and administrative precepts in determining that the subject imports were not a cause of material injury to the domestic industry. *Plaintiff's Brief* at 35.

In the investigation the ITC concluded that "[a]fter considering the record in these investigations, we find no causal link between the condition of the industry and the cumulated subject imports." *Steel Wire Rope II* at 16. The ITC predicated their conclusion on three factors. First, that the cumulated market share of the subject imports was relatively small. Second, that the ITC found no "causal relationship between the pattern of increases and decreases in the subject imports and the performance of the domestic industry." *Id.* Third, they claim to have found "no evidence of adverse price effects by the cumulated subject imports." *Id.* at 17.

Plaintiff claims that the ITC's determination based on these factors was unsupported by substantial evidence and not in accordance with law.

Plaintiff states that the ITC failed to assess the significance of the levels of imports subject to the investigation. According to 19 U.S.C. § 1677(7)(C)(i) (1988 & Supp. 1992), the ITC should "consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."

In the case at hand, imports of steel wire rope from the countries subject to the investigation increased from 15,100 tons in 1988 to 21,903 tons in 1989, and decreased to 18,734 tons in 1990. *Steel Wire Rope II* at A–83. These imports accounted for 7.6%, 10.8% and 9.8% of the appar-

ent domestic consumption of steel wire rope from 1988 to 1990. *Id.* at A–84.

Plaintiff claims that the imports were a substantial percentage of the domestic consumption. Nevertheless, "for one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant." H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979). Furthermore, "it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX Corp. v. United states,* 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987); *Atlantic Sugar, Ltd. v. United States,* 2 CIT 18, 23, 519 F. Supp. 916, 921–22 (1981) (emphasis in original).

The statute does not mandate the exclusive examination of a certain factor like volume. The criteria set forth in section 1677 are merely guidelines to be evaluated in light of other factors and the industry as a whole. In fact, this court has stated that "[u]nder the 'substantial evidence' standard of review, the court must determine whether ITC's conclusions are supported by the evidence on the record *as a whole.*" *USX Corp.,* 11 CIT at 84, 655 F. Supp. at 489 (emphasis in original).

In this case, the volume of subject imports may have increased from 1988 to 1990, but so did the net sales, gross profits and operating income of the domestic industry. Also noteworthy is the fact that the volume of imported steel wire rope decreased by over 2,000 tons from 1989 to 1990. Therefore, in light of all the evidence on the record, it is apparent that the volume of imports did not harm the domestic industry.

Plaintiff further claims that the ITC erred in not finding a causal link between the imports and any material injury to the domestic steel wire rope industry. It is well-settled that if the ITC is unable to find a causal link between material injury and the imports, then it must deny relief to the domestic industry. *Gifford-Hill Cement Co. v. United States,* 9 CIT 357, 359, 615 F. Supp. 577, 579 (1985).

In the case at hand, the ITC determined that the "cumulated market share of the subject imports is relatively small and has been so throughout the period of investigation." *Steel Wire Rope II* at 16. Furthermore, the ITC determined that "[d]uring the three year investigatory period, both the domestic industry and the subject imports gained market share, at the expense of Korean imports, which are not subject to a title VII investigation, and are therefore considered to be fairly traded." *Id.* at 16–17. Thus, plaintiff's complaint, that the ITC failed to consider possible causes of material injury to the domestic industry, is unfounded.

Finally, plaintiff claims that the ITC's determination concerning price effects of the subject imports was unsupported by substantial evidence on the record.

In its determination, the ITC stated that "[n]otwithstanding evidence of some underselling by the imports, prices of the domestic products generally increased during the period of investigation. This is especially so in the case of bright wire rope, which accounts for the bulk

of U.S. production and shipments, by both quantity and value." *Id.* at 17, A–51

Thus, even with an increase in price, the domestic sales still increased. Therefore, in this respect, this Court finds that the ITC acted reasonably and in accordance with law.

3. *Threat of Material Injury:*

In its determination, the ITC also stated that the domestic industry is not threatened with material injury by reason of the subject imports. *Steel Wire Rope I* at 14–18; *Steel Wire Rope II* at 20–23. Plaintiff, however, claims that this is also unsupported by substantial evidence on the record and not in accordance with law. *Plaintiff's Brief* at 52–57.

In determining whether an industry in the United States is threatened with material injury, the ITC shall consider several economic factors including: (1) an increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports, (2) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level, (3) the probability that imports will enter the United States at prices that will have a depressing or suppressing effect on the domestic prices, (4) any substantial increase in inventories of merchandise in the United States, and (5) the presence of underutilized capacity for producing the merchandise in the exporting country. *See* 19 U.S.C. § 1677(F)(i) (Supp. 1992); *see also Steel Wire Rope II* at 18–19.

The ITC evaluated these factors during its investigation and concluded that there was no threat of material injury. As previously stated, the market share of the subject imports was relatively low for the period of investigation. *Steel Wire Rope II* at 20. Furthermore, there was no rapid increase in penetration of the subject imports as "[b]oth the volume and market share of subject imports decreased from 1989 to 1990 and decreased substantially for the first six months of 1991 as compared to the first six months of 1990." *Id.*

Moreover, although there is evidence of underselling, there is nothing in the record indicating that subject imports will have a suppressing or depressing effect on U.S. prices. In fact, prices of domestic products generally increased during this period. *Id.* at 21.

Thus, the ITC's determination that the domestic industry is not threatened with material injury was in accordance with law and is hereby affirmed.

4. *Stainless Steel Wire Rope:*

Plaintiff also claims that the ITC's inclusion of stainless steel wire rope within the "like product" definition was unsupported by substantial evidence on the record. In its final determination, the Commission defined the like product as "all steel wire rope, regardless of composition or end use." *Steel Wire Rope II* at 11.

Pursuant to 19 U.S.C. § 1677(10) (1988 & Supp. 1992), a "like product" is defined as "a product which is like, or in the absence of like, most

similar in characteristics and uses with, the article subject to an investigation under this subtitle."

Generally, the ITC will consider several characteristics in determining what constitutes a "like product." For example, the ITC will consider (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer and producer perceptions, (5) common manufacturing facilities and production employees, and (6) price. *See Torrington Co. v. United States,* 14 CIT 648, 652, 747 F. Supp. 744, 749 (1990), *aff'd,* 938 F.2d 1278 (1991); *see also Asociacion Colombiana de Exportadores de Flores v. United States,* 12 CIT 634, 636–40, 693 F. Supp. 1165, 1167–71 (1988).

With these factors in mind, questionnaire responses from domestic producers confirmed the similarity of production processes, equipment, and employees used in the manufacture of stainless and carbon rope. *See Steel Wire Rope II* at A–25–26.

Plaintiff urges this Court to distinguish stainless rope from carbon rope on the grounds that stainless rope is corrosion-resistant and is used in applications requiring resistance to corroding agents. *Plaintiff's Brief* at 33.

The ITC discussed the similarities as well as any differences between the two types of rope and concluded that they are "like products." For example, although stainless rope is corrosion resistant, various types of carbon rope are also corrosion resistant. Furthermore, carbon and stainless steel rope generally are produced at the same facilities, using the same equipment, processes and employees, are relatively interchangeable and have similar channels of distribution. *See Steel Wire Rope II* at 8–11; *see also, Steel Wire Rope I* at 4–5.

Therefore, this Court finds that the ITC acted reasonably in classifying the two types of rope as "like products," and hereby affirms the determination of the ITC as to this issue.

Conclusion

In accordance with the foregoing opinion, plaintiff's motion is denied. The ITC's conclusion that the domestic steel wire rope industry was not injured or threatened with material injury was reasonable and in accordance with law. Therefore, its determination is affirmed in all respects and this case is dismissed.

(Slip Op. 93–49)

MAKITA CORP., MAKITA U.S.A., INC., AND MAKITA CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 93–02–00114

OPINION AND ORDER

[Defendants enjoined from granting plaintiffs' former law assistant access to dumping investigations on behalf of the petitioning adverse party.]

(Dated April 1, 1993)

Verner, Liipfert, Bernhard, McPherson and Hand, Chartered (*Kathleen H. Hatfield*) for the plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General: *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeffrey M. Telep*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Linda Andros*), of counsel, for the defendants.

AQUILINO, *Judge:* This is another case which raises issues of unusual sensitivity, including the propriety of judicial intervention in on-going administrative proceedings, protection of confidential information, effective assistance of counsel in the absence of access to such information and the interaction of attorneys in zealously representing the competing interests of the clients, to quote from *Hyundai Pipe Co. v. U.S. Dep't of Commerce,* 11 CIT 238 (1987).

I

In its notice of *Initiation of Antidumping Duty Investigations; Professional Electric Cutting Tools and Professional Electric Sanding/Grinding Tools,* 57 Fed. Reg. 28,483 (June 25, 1992), the International Trade Administration, U.S. Department of Commerce ("ITA") stated that it was commencing the proceedings based on a petition filed on behalf of Black & Decker (U.S.) Inc. At that time, the petitioner was represented by the law firm Dorsey & Whitney, which filed with the ITA a form application for administrative protective order signed July 9, 1992 by three lawyers with that firm and two other individuals. The application was granted on July 28, 1992, whereupon Dorsey & Whitney applied to amend the protective order to include another attorney associated with the firm, Panagiotis C. Bayz. That application (of July 30, 1992), however, bore a copy of a written objection by an attorney for the primary focus of the ITA nascent investigations, Makita Corporation, to inclusion of Mr. Bayz under the protective order on the ground that he had

> had a significant and substantial involvement in a Section 337 case Makita had brought before the ITC in 1988–1989. At that time he

was working for Makita, and became privy to Makita's sensitive financial and marketing data.[1]

Before the ITA acted on the request for amendment, signatories of the July 9, 1992 application left Dorsey & Whitney for the law firm Stroock & Stroock & Lavan, along with Mr. Bayz and their client Black & Decker. A new application for a protective order was submitted and granted, followed by another request for inclusion of the firm's new associate.

On February 17, 1993, after more than six months of repeated opposition by Makita, the ITA determined to grant Mr. Bayz access to the confidential information submitted by that respondent corporation per the following reasoning:

> It is clear from the submissions of both parties that Mr. Bayz did have some prior legal involvement with a Section 337 action on behalf of Makita. However, the fact that Mr. Bayz worked on such a matter at various times in the past, and at various levels in his legal maturation, has no bearing as to whether or not he is entitled to an APO under our regulations for the current AD investigation, which involves 1991–92 less than fair value sales allegations. Section 777 of the Tariff Act of 1930 and Department regulations circumscribe the bounds of our jurisdiction. Section 777(C)(1)(A) mandates that the Department * * * "shall make * * * available all business proprietary information * * * to all interested parties who are parties to the proceeding under a protective order * * *". Our regulatory procedures set out how and when a party is entitled to business proprietary information and are concerned with ensuring that parties who gain APOs do not directly, or even inadvertently, disseminate, or in any manner disclose such information to others who are not so entitled. Our application Form ITA–367 (3.89) sets out the limited circumstances that we inquire into when determining whether to grant APO status. The questions are concerned with particular relationships, present and future, that the person applying may have with interested parties to the current proceeding pending before the Department. Where a person currently holds, or will hold, a decision making position in a company that is a party to the proceeding (eg., in-house counsel[)], or holds, or will hold such a position in the company of a competitor of a party(s) to the proceeding, then the Department may determine not to grant APO status under these circumstances. Again, this will be a limited decision for the sole purpose of determining if the relationship in question would compromise proprietary information to be released under APO, now or in the future.
>
> Additionally, whether or not a 337 action is substantially related to the current AD investigation before the Department is not relevant to the inquiry we must make before granting APO status, nor is it relevant that Bayz may have information concerning Makita's past Section 337 action, which might now assist or give some

[1] Letter of William A. Zeitler to James Taylor, p. 1 (July 29, 1992).

> advantage to petitioner or its counsel in this pending investigation. Since the Department has no jurisdiction over parties to a 337 action it can not make findings regarding information submitted in that matter. Rather, the Department has limited jurisdiction to determine who may receive APO status in antidumping or countervailing duty proceedings based upon the current and future relationships of those requesting an APO with those parties that have submitted business proprietary information in a current proceeding. Therefore, the Department takes no position regarding actual or potential breaches of conflict of interest and/or attorney-client privilege by Bayz, and we do not deem it a matter that is within our provence to decide upon.
>
> Rather, such allegations would seem to be more appropriately decided by the Bar in which Bayz is a member, or in some other forum which has jurisdiction over such matters.* * *
>
> * * * Mr. Bayz has provided all of the information required by the Department in his applications for protective order, FORM ITA–367 (3.89). Moreover, it is the Department's general policy not to interfere in a party's choice of representation.

This decision concluded by warning that the respondent(s) had two business days within which to withdraw any

> information Makita does not want to release to Mr. Bayz. Any information withdrawn will not be considered in this proceeding and may result in the use of the best information available for the Department's final determination.

II

This case then commenced, and, after immediate oral argument from both sides on plaintiffs' proposed order to show cause, the court granted a temporary restraining order, pending formal response by the defendants and a full hearing on plaintiffs' application for a preliminary injunction. Such a hearing has been held, at the conclusion of which the defendants consented to extension of the restraining order until this decision.

A

In 1988, Makita U.S.A., Inc. and Makita Corporation of America filed a complaint with the U.S. International Trade Commission ("ITC"), alleging unfair methods of competition and unfair acts in the importation of articles into the United States within the meaning of 19 U.S.C. § 1337. *See Certain Electric Power Tools, Battery Cartridges and Battery Chargers,* 53 Fed.Reg. 31,112 (Aug. 17, 1988). Counsel for the complainants were Bell, Boyd & Lloyd, who had had Panagiotis C. Bayz in their employ as a paralegal since May 1986.

According to an affidavit submitted in the matter now before the ITA by Mr. Bayz, he began law school in August 1988, subsequent to which he was a "part-time law clerk with Bell, Boyd & Lloyd from January 1989 to April 1990 and * * * a summer associate from May to July, 1989." He states that, during those months at the firm, he worked with

William A. Zeitler and other attorneys on the section 1337 complaint filed by Makita. An affidavit provided to the court in this case by Mr. Zeitler adds:

> 4. I was lead counsel for Makita in the Section 337 proceeding. As such, I was aware of Mr. * * * Bayz's activities on behalf of Makita in his various capacities as paralegal, law clerk, and summer associate at Bell, Boyd & Lloyd.
>
> 5. Mr. Bayz spent a significant portion of his time at Bell, Boyd & Lloyd on Makita matters. I recall Mr. Bayz having meetings with me about pricing comparisons of Makita's and competitors' products that I had requested him to do. Also, there were deposition digests I asked him to prepare, and Makita documents that I asked him to review. Mr. Bayz also had input into a large number of the pleadings, or portions of the pleadings, in the Section 337 proceeding. This included the appeal to the Federal Circuit, large parts of which were filed seal.
>
> 6. As a part of the Section 337 proceeding, Makita produced thousands (at least 80,000) of documents, most of which were submitted under the ITC protective order. Mr. Bayz had access to these for his legal tasks. These documents contained confidential information regarding Makita's competition, Makita's distribution practices, its pricing practices, operations and sales figures. Mr. Bayz also had access to information relating to the similarities/differences between Makita's various tools and Makita's marketing practices.
>
> 7. In addition, Mr. Bayz had access to sensitive production data at Makita's production facilities at Buford, GA., as well as profit and loss statements for Makita Corp., Makita USA, Inc. and Makita Corporation of America.
>
> 8. Mr. Bayz assisted Makita in compiling, and had access to, the confidential data underlying Makita's submission in the Section 301 retaliatory tariff proceeding in 1987 where Black & Decker, the petitioner in the current antidumping investigation, was urging the imposition of 100% retaliatory tariffs on Makita's tools.

Mr. Zeitler supplemented this affidavit with testimony at the hearing in open court.[2]

On their part, the defendants have interposed an answer to the complaint, which concedes, among other things, that the court is possessed of jurisdiction over this case[3]—pursuant to 28 U.S.C. § 1581(i). *See Hyundai Pipe Co. v. U.S. Dep't of Commerce,* 11 CIT at 242; *Sacilor, Acieries et Laminoirs de Lorraine v. United States,* 3 CIT 191, 542 F.Supp. 1020 (1982); *Arbed, S.A. v. United States,* 4 CIT 132 (1982). The defendants have also served and filed a motion styled as to dismiss pursuant to CIT Rule 12(b)(5). However, the prior joinder of issue via their answer, combined with matters presented outside the pleadings by the plaintiffs, make defendants' motion one for summary judgment in accordance with CIT Rule 12(c).

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[2] The court's temporary restraining order required timely service of a copy thereof on Stroock & Stroock & Lavan. No one from that firm was thereafter in attendance at the hearing.

[3] The complaint alleges jurisdiction pursuant to 28 U.S.C. § 1581(f) and 1585.

The motion takes the position that (1) the applicable statute, regulations and case law mandate Commerce to disclose business proprietary information under administrative protective order; (2) the plaintiffs have failed to allege that their business proprietary information fulfills one of the exceptions set forth in the statute; (3) the ITA properly decided to release Makita's business proprietary information to Mr. Bayz; and (4) the regulatory safeguards are sufficient to deter him from violating the administrative protective order.[4]

B

Of course, the defendants are correct to emphasize that the law mandates that the ITA disclose business proprietary information under administrative protective order, and that occurred expeditiously in this matter. In fact, not only were the initial five signatories of the Dorsey & Whitney application granted access, but also one law clerk, two legal assistants, four legal secretaries, one documents clerk and one messenger, for a total of 14 persons. The statute under which such access was granted, 19 U.S.C. § 1677f(c)(1)(A), provides, in general, that:

> Upon receipt of an application * * * which describes in general terms the information requested and sets forth the reasons for the request, the administering authority * * * shall make all business proprietary information presented to, or obtained by it, during a proceeding (except privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding under a protective order described in subparagraph (B), regardless of when the information is submitted during a proceeding. * * *

The specified exceptions to disclosure "are intended to be very narrow and limited"[5] for the statute favors production.

As quoted above, the ITA concluded that the application(s) on behalf of Mr. Bayz did not implicate any of the three exceptions, characterizing its decision as "limited * * * for the sole purpose of determining if the relationship in question would compromise proprietary information to be released under APO, now or in the future." In other words, the agency believes it has "limited jurisdiction" and therefore

> takes no position regarding actual or potential breaches of conflict of interest and/or attorney-client privilege by Bayz, and we do not deem it a matter that is within our provence to decide upon.
>
> Rather, such allegations would seem to be more appropriately decided by the Bar in which Bayz is a member, or in some other forum which has jurisdiction over such matters.

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[4] *See generally* Defendants' Memorandum in Support of its [*sic*] Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, pp. 9–21.

[5] H.R. Rep. No. 576, 100th Cong., 2d Sess. 623 (1988).

C

This is a forum which has jurisdiction over such matters.[6] Panagiotis C. Bayz is a member of the Bar of this Court of International Trade, which has plenary authority and responsibility to supervise professional conduct. *See generally Nat'l Bonded Warehouse Ass'n, Inc. v. United States,* 13 CIT 590, 718 F. Supp. 967 (1989). *See also* 28 U.S.C. § 1585 (the Court of International Trade possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States,"); *Trone v. Smith,* 621 F.2d 994, 999 (9th Cir. 1980); *Richardson v. Hamilton Int'l Corp.,* 469 F.2d 1382, 1385–86 (3d Cir. 1972), *cert. denied,* 411 U.S. 986 (1973). The plaintiffs argue that there is a clear and compelling need to withhold disclosure, "not because plaintiffs fear Mr. Bayz would divulge information to persons not covered by the APO, but because he comes to the APO already disqualified under case law and the ethical canons governing the legal profession."[7] Indeed, when Makita first objected last summer, Dorsey & Whitney sought to rely on section 1.9 of the District of Columbia Rules of Professional Conduct[8]. ABA Model Rule of Professional Conduct 1.9 parallels that section, providing *in toto* under the rubric Conflict of Interest: Former Client:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client consents after consultation.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

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[6] The defendants take the position that jurisdiction is predicated upon 28 U.S.C. § 1581(i), thereby making this civil action one not specified in subsections (a) through (c) of 28 U.S.C. § 2640. In such cases, subsection (d) thereof provides for review as provided in 5 U.S.C. § 706.

[7] Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, p. 9.

[8] According to the firm's APO application, Mr. Bayz is also admitted to the practice of law in the District of Columbia and in the state of Maryland.

Although the Model Rules are for lawyers, nonlawyers are also under an obligation not to compromise the legal representation of the clients of firms in which they work. For example, Model Rule 5.3 imposes a duty on a supervising attorney to ensure that nonlawyers' conduct is compatible with the professional obligations of lawyers. Where nonlawyers have had access to confidential information and subsequently change firms, courts have held them to the same standards of Rule 1.9. *E.g., Williams v. Trans World Airlines,* 588 F.Supp. 1037, 1044 (W.D.Mo. 1984):

> * * * If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's non-lawyer support staff left the attorney's employment, it would have devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney. Every departing secretary, investigator, or paralegal would be free to impart confidential information to the opposition without effective restraint. The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these "agents" of lawyers to the same disability lawyers have when they leave legal employment with confidential information.

A difference, however, is that, rather than disqualify an entire firm when a member would represent the other side of a substantially-related matter, a nonlawyer can generally be screened from working on that side. *See, e.g.,* ABA informal opinion 88–1526; *Kapco Manufacturing Co. v. C & O Enterprises, Inc.,* 637 F.Supp. 1231 (N.D.Ill. 1985).

As to whether a matter is substantially-related or not, *T.C. Theatre Corp. v. Warner Bros. Pictures,* 113 F.Supp. 265 (S.D.N.Y.), *reh'g denied,* 125 F.Supp. 233 (S.D.N.Y. 1953), originally articulated the test as follows:

> A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.
>
> * * * * * * *
>
> * * * [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Id. at 268–69 (footnotes omitted). This approach has been refined in the Second Circuit, for example, so that an attorney may be disqualified from representing a client in a particular case if

> (1) the moving party is a former client of the adverse party's counsel;
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
> (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Evans v. Artek Systems Corp., 715 F.2d 788, 791 (2d Cir. 1983), citing *Cheng v. GAF Corp.*, 631 F.2d 1052, 1055–56 (2d Cir. 1980), *judgment vacated on other grounds*, 450 U.S. 903 (1981), and *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 570–71 (2d Cir. 1973).

In the case at bar, Makita is the client of Mr. Bayz's former supervising attorney and seeks to prevent his proceeding now against its interests. The record reveals that Mr. Bayz had access to sensitive Makita business proprietary information which it wishes to continue to protect.[9] As for the other element of disqualification, courts have shown concern for a client's right to counsel of choice and also for the complications which can develop in litigation when disqualification occurs. *See, e.g., Gov't of India v. Cook Industries, Inc.*, 569 F.2d 737 (2d Cir. 1978). Here, however, petitioner Black & Decker is apparently ably represented; it has not sought to express any views or to take any position in this case, and the defendants indicated at the hearing that the continuing non-access of Mr. Bayz, some six months of which is the responsibility of the ITA itself[10], has not impeded the progress of the agency investigations.[11]

Suffice it to state on the record presented that the question is simply whether or not Mr. Bayz's participation in the proceedings brought by Black & Decker would be substantially-related to his earlier participation on behalf of Makita.

On this point, counsel for the plaintiffs argue now that the respondents in the

> Section 337 case focused heavily on an extensive analysis of Makita's pricing, profit and loss, marketing, sales and financial data. They were also concerned with Makita's corporate structure, production processes, product characteristics and its U.S. distributors and customers. Thus, the Section 337 case addressed the very same matters (pricing and sales practices, distribution and retail-

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[9] The court notes in passing that, if some 80,000 documents were produced by Makita in the section 1337 investigation, it may be "humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship." *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1467 (Fed.Cir. 1984), quoting from the opinion of the court below, 6 CIT 55, 57, 569 F.Supp. 870, 872 (1983).

[10] *Cf.* 19 U.S.C. § 1677f(c)(1)(C), which provides that the agency determine whether to make information available not later than 30 days after the date submitted.

[11] Witness the ITA preliminary determinations of Makita sales at less than fair value, 58 Fed.Reg. 81–84 (Jan. 4, 1993).

> ing practices, accounting and marketing practices, product development and corporate strategy), which are key to the current antidumping investigation.

Plaintiffs' Memorandum, p. 5. This position finds support in the published reports of the ITC to date on both proceedings. *Compare* USITC Pub. 2389 (June 1991) *with* USITC Pub. 2536 (July 1992).

The plaintiffs also argue that both sections of the Tariff Act of 1930, as amended, 1337 and 1673 of Title 19, U.S.C., provide a remedy for the differential pricing which results from anticompetitive conduct of foreign manufacturers and exporters and also that a complainant or petitioner be part of a domestic, U.S. industry suffering injury as a result of that conduct. The plaintiffs point out that (1) market penetration by imports, (2) lost sales, (3) decreases in production, (4) decreases in sales, (5) reduction in profitability, (6) decreases in employment in the affected industry, (7) lower prices of the imports, (8) production capacity of the respondent in the foreign country and (9) intent to penetrate the U.S. market are all factors in an injury determination under section 1337, while (1) volume of market penetration by imports, (2) effect of the imports on prices, (3) impact of imports on operations of domestic producers, (4) price underselling, (5) price suppression, (6) decreases in production, (7) decreases in sales, (8) decreases in employment in the affected industry and (9) production capacity in the foreign country are all factors for determining material injury due to dumping.

In fact, subsection (b)(3) of 19 U.S.C. § 1337 contemplates that issues raised under that section can be determined to be so related to matters within the purview of 1673 as to curtail investigation under 1337.[12] That did not happen with regard to Makita, but this circumstance does not color the court's consideration of the conflict-of-interest issue, which focuses on the situation of the lawyer rather than on that of an agency under the statute.

With regard to Mr. Bayz and his actual involvement in the proceedings on behalf of Makita pursuant to section 1337, as contrasted with the predictable involvement by him on behalf of Black & Decker under section 1673, this court cannot conclude from the record at hand that those involvements would be substantially unrelated. On the contrary, the latter would appear to be necessarily related to plaintiffs' business practices and data, which were at the core of Mr. Bayz's former confidential involvement.

If, on the other hand, the opposite conclusion were indicated, any participation in the ITA investigations by Mr. Bayz would be constricted by the prior ITC section 1337 protective order.[13] And ABA Model Rule of Professional Conduct 1.7(b) provides that a

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[12] Moreover, affirmative results of ITA investigations of alleged dumping require the ITC to then make determinations as to material injury or threats thereof. This has transpired herein. *See Professional Electric Cutting and Sanding/Grinding Tools From Japan*, ITC Inv. No. 731–TA–571 (Final), 58 Fed.Reg. 6,975 (Feb. 3, 1993).

[13] *Compare* 19 C.F.R. § 210.37(c), the regulation governing violation of an ITC protective order, *with* 19 C.F.R. § 201.15(a) ("Any attorney or agent practicing before the Commission * * * may for good cause shown be suspended or barred from practicing before the Commission, or have imposed on him such lesser sanctions as the Commission deems appropriate").

> lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation.
>
> * * * * * * *

In short, if Mr. Bayz were to participate in the antidumping proceedings on Black & Decker's behalf, while still subject to constraints arising out of the section 1337 investigation, he would be unable to give his complete best efforts on behalf of Black & Decker. In this regard, the court in *Trone v. Smith* stated, 621 F.2d at 998–99:

> Both the lawyer and the client should expect that the lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf. That professional commitment is not furthered, but endangered, if the possibility exists that the lawyer will change sides later in a substantially related matter. Both the fact and the appearance of total professional commitment are endangered by adverse representation in related cases. From this standpoint it matters not whether confidences were in fact imparted to the lawyer by the client. The substantial relationship between the two representations is itself sufficient to disqualify.

D

To summarize the preceding part C of this opinion, the plaintiffs have persuaded the court of the likelihood of their success on the merits, but grant of an application for preliminary injunctive relief also requires a showing of a threat of immediate irreparable harm, that the public interest would be better served by issuing rather than by denying an injunction, and a balance of hardship in the applicant's favor. *E.g., S.J. Stile Associates Ltd. v. Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *Federal-Mogul Corporation v. United States,* 16 CIT ___, ___, 808 F.Supp. 839, 840 (1992).

Neither in their papers in opposition nor at the hearing have the defendants shown a balance tipped in their favor on the latter two grounds. This is doubtless true for several reasons: The real party in interest, be it petitioner Black & Decker or its counsel Stroock & Stroock & Lavan or their associate Panagiotis C. Bayz, is not before the court. By way of comparison, in a matter in which the ITA had denied access under protective order to an attorney chosen by the subject of an antidumping-duty administrative review, the agency did not defend its decision on judicial review in the Court of International Trade, only the prevailing party in interest, which intervened in opposition to that subject's complaint. *See Ornatube Enterprise Co. v. United States,* 17 CIT ___, Slip Op. 93–29 (March 10, 1993). Whatever the role of the

government in the proceedings at bar, the participation or nonparticipation of Mr. Bayz in them does not portend any harm to the ITA or its weighty responsibilities, but the same cannot be said of the plaintiff subjects of the agency's investigations. As for the public, its interest therein is the fair and efficient administration of U.S. trade laws, as well as the appearance of such administration in the eyes of all who come within their realm. Clearly, that interest would not be enhanced by dismissing this case summarily per defendants' motion.

In *Hyundai Pipe Co.*, this court held that, not only is the revelation of a secret an irrevocable act, any rights of a party injured by either advertent or inadvertent use of confidential information could not redress that particular, irreparable harm. 11 CIT at 243, citing *A. Hirsh, Inc. v. United States,* 11 CIT 208, 211, 657 F.Supp. 1297, 1300 (1987), and *Akzo N.V. v. U.S. Int'l Trade Comm'n,* 808 F.2d 1471, 1483 (Fed.Cir. 1986), *cert. denied,* 482 U.S. 909 (1987). Of course, unlike those cases, disclosure is not quite the point here. According to the plaintiffs, they have already shared much inside information with Mr. Bayz while in their employ. Mr. Zeitler testifies to that employment in a wholly-complimentary fashion, so much so that his clients claim fear of unfair advantage if their adversary Black & Decker is at liberty to avail itself of Mr. Bayz's accumulated knowledge. Whatever has already happened independent of these proceedings, this case requires the court to look to the present and the future, and, from this perspective, it cannot be said with certainty that any taking of unfair advantage could be remedied *ex post facto.* Ergo, the plaintiffs are confronted with the threat of irreparable harm. Moreover, this and other courts have held that the severity of the injury the moving party will sustain without injunctive relief is in inverse proportion to the showing of likelihood of success on the merits. *See Smith Corona Corp. v. United States,* 11 CIT 954, 965, 678 F.Supp. 285, 293 (1987); *Ceramica Regiomontana, S.A. v. United States,* 7 CIT 390, 395, 590 F.Supp. 1260, 1264 (1984); and *American Air Parcel Forwarding Co. v. United States,* 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981).

III

Clearly, the foregoing discussion indicates continuing injunctive relief. This leads to consideration of the appropriate nature thereof in the absence of the real adverse party or parties in interest. Since only the ITA is properly before the court, relief can only be granted as against it.

That agency considers itself without authority to forestall a conflict of interest other than to offer the plaintiffs a choice comparable to that of Thomas Hobson, to wit, agree that your former confidant assist your adversary in a substantially-related manner against you or withdraw your inside information so that your adversary's version of the data can be accepted as true. This is the kind of predicament a conflict of interest can cause. They are to be guarded against by all who are bound by the lawyers' rules of professional conduct, and, in those instances when resolve under the rules appears weak, courts must and will intervene to protect the practices agreed upon.

In this instance, which is seemingly a rare case, the court concludes that defendants' motion to dismiss must be, and it hereby is, denied. The court further concludes that plaintiffs' application for a preliminary injunction must be, and it hereby is, granted to the extent that the defendants and their officers, employees, agents, servants, sureties and assigns be, and each hereby is, enjoined from allowing Panagiotis C. Bayz any access to the ITA's investigations of Makita Corporation *et alia* at the behest of petitioner Black & Decker pending further direction from the court or proceedings herein.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/37 3/30/93 Aquilino, J.	Sick Optik Electronic, Inc.	88–01–00051	712.05 10% 11.9%	712.49 5.5% 4.9% and other parts 685.90 5.7% 5.3%	Agreed statement of facts	Not stated Optical heads, photo-electric devices, light curtains and other parts
C93/38 4/1/93 Aquilino, J.	E. Gluck Corp.	86–10–01338	716.09–716.45, 715.05, etc. various rates	688.40, 688.45, 688.43, or 688.42, etc. various rates	Belfont Sales Corp. *v.* United States 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* United States 673 F.2d 1375 (1982)	New York

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V93/3 3/31/93 DiCarlo, J.	Delta Shoe	92–03–00127	Not stated	Entered values and additional duties and any interest paid	Nunn Bush *v.* United States 784 F. Supp. 892 (CIT 1992)	Miami Non-rubber footwear
V93/4 3/31/93 DiCarlo, J.	Felix Matos	92–05–00352	Not stated	Entered values and additional duties and any interest paid	Nunn Bush *v.* United States 784 F. Supp. 892 (CIT 1992)	San Juan Non-rubber footwear
V93/5 3/31/93 DiCarlo, J.	La Canastilla Cubana	92–03–00129	Not stated	Entered values and additional duties and any interest paid	Nunn Bush *v.* United States 784 F. Supp. 892 (CIT 1992)	Miami Non-rubber footwear
V93/6 3/31/93 DiCarlo, J.	Spanish Creations Inc.	92–03–00128	Not stated	Entered values and additional duties and any interest paid	Nunn Bush *v.* United States 784 F. Supp. 892 (CIT 1992)	Miami Non-rubber footwear

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